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<i>Case</i>	<i>Reported</i>	<i>Disposition in Supreme Court</i>
State v. Queen	65 N.C. App. 820	Denied, 310 N.C. 629 Appeal Dismissed
State v. Roberson	65 N.C. App. 624	Denied, 310 N.C. 629
State v. Salters	65 N.C. App. 31	Denied, 310 N.C. 479
State v. Smith	65 N.C. App. 222	Denied, 310 N.C. 310
State v. Smith	65 N.C. App. 684	Allowed, 310 N.C. 480
State v. Summerford	65 N.C. App. 519	Denied, 310 N.C. 311 Appeal Dismissed
State v. Tennant	65 N.C. App. 222	Denied, 311 N.C. 407
State v. Weldon	65 N.C. App. 376	Allowed, 310 N.C. 748
State v. Wells	65 N.C. App. 825	Denied, 310 N.C. 630 Appeal Dismissed
State v. Williams	65 N.C. App. 373	Denied, 310 N.C. 480
West v. West	65 N.C. App. 417	Allowed, 310 N.C. 481
Weston v. Sears Roebuck & Co.	65 N.C. App. 309	Denied, 311 N.C. 407
Williams v. Hydro Print	65 N.C. App. 1	Denied, 310 N.C. 156
Willoughby v. Wilkins	65 N.C. App. 62	Denied, 310 N.C. 631
Zwigard v. Mobil Oil	65 N.C. App. 526	Denied, 310 N.C. 748

CASES
ARGUED AND DETERMINED IN THE
COURT OF APPEALS
OF
NORTH CAROLINA
AT
RALEIGH

MELVIN WILLIAMS v. HYDRO PRINT, INC. AND INDIANA LUMBERMENS
MUTUAL INSURANCE COMPANY

No. 8210IC640

(Filed 15 November 1983)

Master and Servant § 60.3— workers' compensation—injury during rest break

Plaintiff's injury by accident during a regularly scheduled rest break arose out of and in the course of his employment where plaintiff was inside the enclosed backyard of the employer's plant with 30-40 other employees; the employees were not permitted to leave the employer's premises during rest breaks without permission from the supervisor; a spur railroad track ran through the yard; plaintiff was standing with two other men about 30 feet from the track during daylight hours when one of the men called their attention to a glittering object on the track; plaintiff started to run with the other two men in the direction of the glittering object because he thought it might be money; plaintiff stumbled when his foot caught on the end of one of the railroad ties and his left knee struck the track as he went down; plaintiff suffered a fractured tibia and fibula of the left leg; there were no rules or regulations prohibiting running on the employer's premises; and every day some of the employees would run to the time clock at the end of the shift to see who could get there first.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 15 April 1982. Heard in the Court of Appeals 22 April 1983.

Defendants appeal from an award of workers' compensation benefits to plaintiff, Melvin Williams, for an injury to his left leg and knee sustained while he was on a scheduled 15 minute rest

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period in the fenced-in backyard of the defendant Hydro Print, Inc.'s plant.

John B. Whitley and George C. Collie, for defendant appellant.

Justice and Parnell, by James F. Justice, for plaintiff appellee.

JOHNSON, Judge.

The question presented for review is whether the Industrial Commission correctly found and concluded that Melvin Williams' injury by accident arose out of and in the course of his employment. For the reasons set forth below, we answer the question in the affirmative.

The only injury which is compensable under the Workers' Compensation Act is an injury "by accident arising out of and in the course of the employment." G.S. 97-2(6). The determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and the appellate court may review the record to determine if the findings and conclusions of the Industrial Commission are supported by sufficient evidence. G.S. 97-86; *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977).

The uncontradicted evidence tended to show that the plaintiff was a 45 year old laborer with a 7th grade education. He had been employed by the defendant, Hydro Print, Inc., since February, 1980. Plaintiff's duties were to load and maintain a certain machine in the employer's plant, and his shift involved working from 3:45 p.m. to 3:00 a.m. It was the defendant employer's practice on plaintiff's shift to have a 10 or 15 minute rest or relaxation break between 7:00 and 7:15 p.m., to have a 45 minute lunch break sometime later and then have another 10 or 15 minute rest break sometime later than that.

Plaintiff was injured at 7:10 p.m. on 22 May 1980, during the first rest break. He was inside the enclosed backyard of the employer's plant along with 30 or 40 other employees. The plant employees regularly went to that area during rest breaks. The yard was enclosed by a chain link fence, 7 or 8 feet high. The gate

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in the fence was locked, and employees were not permitted to leave the plant premises during the rest breaks without permission from the supervisor. A spur railroad track ran through the yard. The track leads through the fence to a loading platform at the rear of the plant. Cars owned by the employees were also parked within the yard.

On the evening in question, plaintiff was standing in a group with two other men about thirty feet away from the track. It was still daylight and the sun was shining brightly. One of the men suddenly yelled, "What is that on the track?" The three men, including plaintiff, looked in the direction of the track. There was a shiny object on the track that appeared to be "glittering." All three men made sudden moves to start running. Plaintiff started to run with the other two in the direction of the glittering object. He took three or four steps and started stumbling. His foot caught on the end of one of the railroad track ties and his left knee struck the track as he went down.

The other two men ran toward the object on the track at the same time that plaintiff did. They had not been scuffling, pushing, shoving or playing around in any way, nor had they discussed racing each other or otherwise planned to run toward the track. Plaintiff testified that he assumed that the shiny object was money because the small dollar coins had just been issued; he impulsively took off running toward the object because he thought it might be money. The nature of the "shiny object" was not disclosed by the evidence.

Plaintiff suffered a fractured tibia and fibula of the left leg. The fracture invaded the knee joint and was severe. Although the fracture has healed, plaintiff has not fully recovered and future surgery is indicated.

There were no rules or regulations prohibiting running on the premises. In fact, every day some of the employees would run to the time clock at the end of a shift to see who could get there first and the plaintiff never saw or heard of any employee being called down for racing in the plant.

The Industrial Commission's findings of fact reflect the foregoing evidence. The plaintiff was also found to be temporarily to-

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tally disabled as a result of injury. The opinion and award, in pertinent part, reads as follows:

CONCLUSIONS OF LAW

1. On May 22, 1980 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer.

COMMENT

Since plaintiff remained on the premises and was required to do so absent permission of his supervisor to leave the premises, his injury was definitely in the course of his employment.

As to whether or not it arose out of the employment, plaintiff's deviation in running along the railroad track was not sufficient to be a deviation from his employment that would take him out of coverage of the Workers' Compensation Act. See Larson, § 23.66.

The defendant employer contends that the evidence totally fails to support the Industrial Commission's findings and conclusions that plaintiff's injury by accident arose out of and in the course of his employment because (1) the accident originated in plaintiff's personal decision to run; (2) plaintiff was not then engaged in the duties of his employment or some authorized activity incident thereto; (3) the accident was not caused by any risk inherent in his work environment or related to his employment; and (4) any risk in such running was a personal risk distinct and disassociated from plaintiff's employment. We disagree.

In interpreting G.S. 97-2(6), the Supreme Court has stated:

" . . . The words 'out of' refer to the origin or cause of the accident and the words 'in the course of' to the time, place, and circumstances under which it occurred. [Citations omitted.] There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected. [Citations omitted.]"

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Watkins v. City of Wilmington, 290 N.C. 276, 280, 225 S.E. 2d 577, 580 (1976), quoting *Conrad v. Foundry Company*, 198 N.C. 723, 726, 153 S.E. 266, 269 (1930). The phrases "arising out of" and "in the course of" employment are not synonymous, but involve two distinct ideas and impose a double condition, both of which must be satisfied in order to render an injury compensable. *Poteete v. North State Pyrophyllite Co.*, 240 N.C. 561, 82 S.E. 2d 693 (1954). Together, the two phrases are used in an attempt to separate work-related injuries from nonwork-related injuries. *Watkins v. City of Wilmington*, *supra*. A conjunction of the factors of time, place and circumstances will bring a particular accident within the concept of *course of* employment. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968). In *Harless* this Court held that the plaintiff's injuries arose out of and in the course of her employment where her injuries resulted from a collision between two automobiles of co-employees in the company parking lot as the two automobiles were leaving the parking lot to go to lunch off the premises. The opinion contains an extensive review of the relevant case law and sets forth the following general principles:

The words *in the course of* have reference to the "time, place and circumstances" under which the accident occurred . . .

* * *

With respect to *time*, the course of employment begins a reasonable time before actual work begins . . . and continues for a reasonable time after work ends . . . and includes intervals during the day for rest and refreshment . . .

With respect to *place*, the course of employment includes the premises of the employer . . . "It is usually held that an injury on a parking lot owned or maintained by the employer for his employees is an injury on the employer's premises."

. . .

With respect to *circumstances*, injuries within the course of employment include those sustained while "the employee is doing what a man so employed may reasonably do within a time which he is employed and at a place where he may reasonably be during that time to do that thing." . . .

* * *

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In tending to his personal, physical needs an employee is indirectly benefiting his employer. Therefore, the course of employment continues when the employee goes to the wash-room . . . takes a smoke break . . . takes a break to partake of refreshment . . . goes on a personal errand involving temporary absence from his post of duty . . . voluntarily leaves his post to assist another employee . . . (Citations omitted.)

1 N.C. App. at 455-457, 162 S.E. 2d at 52-53.

In the present case plaintiff Williams was clearly in the course of his employment with respect to the factors of time, place and circumstances as those terms have been interpreted by our courts. Plaintiff was injured during the first regularly scheduled rest break of his shift. He, along with 30 to 40 other employees, were locked inside the enclosed backyard of the plant premises as was customary during these rest breaks. For all practical purposes, plaintiff was required to remain in the yard during his 15 minute break for rest and relaxation since it was enclosed by a 7 foot high chain link fence and employees were not permitted to leave the plant premises during the rest breaks without express permission. The railroad track on which plaintiff tripped and suffered his injury was an integral part of the plant equipment where he worked and took his breaks.

The fact that the plaintiff was not actually engaged in the performance of his duties as a laborer at the time of the injury does not automatically defeat his claim for compensation. *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320 (1944) (accident occurring while deceased watchman, returning to the washroom for his flashlight, was pushed aside by fellow employee in a hurry arose out of and in the course of employment). In *Bellamy v. Manufacturing Co.*, 200 N.C. 676, 158 S.E. 246 (1931), it was held that an accident was in the course of employment, and the employee entitled to compensation, where the evidence tended to show that the employees in defendant's spinning department were required to remain in the mill for a half hour after work stopped, that an employee was injured during this time in an accident while riding in an elevator to another floor with a friend for the purpose of seeing about getting her friend a job in the mill, and it was the custom of the employees to use the elevator. In *Harless v. Flynn*, *supra*, the plaintiff's injuries occurring during her lunch hour as

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she was in the process of leaving her employer's parking lot, with the acquiescence of the employer, to eat lunch off the employer's premises, were held to occur in the course of employment. See also 1A Larson, The Law of Workmen's Compensation § 21.21(a) (1982) (the course of employment goes beyond an employee's fixed hours of work to include regular unpaid rest periods taken on the premises since the activity is related to employment under the personal comfort doctrine). Thus, plaintiff's rest break accident on the employer's premises clearly occurred during the course of his employment. If, in addition to this, the accident *arose out of* employment, then his resulting injury is properly compensable under the Act.

With respect to *arising out of*, the *Harless* court cited the following general rules:

The phrase *arising out of* has reference to the origin or cause of the accident . . . But this is not to say that the accident must have been caused by the employment. "Taking the words themselves, one is first struck by the fact that in the 'arising' phrase, the function of employment is *passive* while in the 'caused by' phrase it is *active*. When one speaks of an event 'arising out of employment,' the initiative, the moving force, is something other than the employment; the employment is thought of more as a *condition* out of which the event arises than as the force producing the event in affirmative fashion." 1 Larson, Workmen's Compensation Law, § 6.50, p. 45. The North Carolina Supreme Court has similarly stated the connection between the employment and the accident: "Where any reasonable relationship to the employment exists or employment is a contributory cause, the Court is justified in upholding the award as 'arising out of employment.'" (Citation omitted.)

* * *

An injury arises out of the employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein (citation omitted). For an accident to arise out of the employment, there must be some causal connection between the injury and the employment. When an in-

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jury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment.

1 N.C. App. at 455, 162 S.E. 2d at 52. In concluding that the plaintiff's injuries were due to "an employment-connected risk" as opposed to one obviously common to the public at large, the court in *Harless* stated:

The risk of injury in an automobile mishap is one that is obviously common to the public at large . . . Yet where large numbers of employees drive automobiles to their places of employment and provision is made for parking on the employer's premises it is clear that the employment itself has created conditions in which the risk of automobile-connected injuries is different in kind and possibly greater in degree than that confronted by the public at large. The risk may be increased by a large number of automobiles, concentrated in a confined space, coming into and going out of the lot at approximately the same times, operated by employees who may be preoccupied with thoughts or work to be begun, or exhausted from work completed and anxious to get to their respective homes or other places of relaxation and refreshment . . . It clearly appears that plaintiff was injured by accident *arising out of her employment*." (Citations omitted.)

1 N.C. App. at 459, 162 S.E. 2d at 55. Similarly, in *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97 (1946), the Supreme Court stated that an accident arises out of the employment when it occurs in the course of employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. Further, that acts necessary to the life, comfort and convenience of the employee are incidental to employment, and an accident occurring in the performance of such acts is generally regarded as arising out of and in the course of the employment. Applying those general rules to the facts shown by the evidence, the court in *Rewis* upheld an award of compensation to an employee who, feeling faint from colitis, went to the men's washroom, slipped on the slick tile floor as he went to one of the open windows for some

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fresh air, and fell through the window to his death nine stories below.

The Industrial Commission correctly concluded that plaintiff's injury arose out of his employment, that is, had its origin in an employment-connected risk as opposed to one common to the public at large. Plaintiff was locked inside the plant yard which was enclosed with a high chain link fence with a large crowd of fellow employees as was customary during a regularly scheduled rest break. The railroad track over which he tripped and injured his knee was an integral part of the equipment of the plant, and it ran directly through the area in which he took his relaxation breaks. Permission from the plant supervisor was necessary in order for an employee to leave the plant premises during these scheduled rest breaks. All of these factors created conditions in which the risk of injury of the type the plaintiff suffered was very different in kind and much greater in degree than that confronted by the public at large.

The situation at bar is not unlike that presented in *Bellamy v. Manufacturing Co.*, *supra*, where the claimant was required to remain in the mill for a half hour after work stopped and was then injured by accident while riding in an elevator on a personal errand. Similarly, in *Watkins v. City of Wilmington*, *supra*, the claimant-fireman was required to remain at the fire station during his entire 24-hour tour of duty. The evidence and findings were to the effect that the firemen often made minor repairs on their automobiles on fire station premises during their lunch hour, that the practice was allowed by the claimant's supervisors, and that these repairs benefited the fire department. The claimant was injured in an explosion which occurred when he poured gasoline on the oil breather cap from a co-worker's car in an attempt to clean it during his lunch hour on the employer's premises. The court, quoting from 1 Larson, Workmen's Compensation Law § 29.00 (1972), stated that "course of employment" and "arising out of employment" are both parts of a single test of work-connection and therefore, "deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other." 290 N.C. at 281, 225 S.E. 2d at 581. The court held that the plaintiff's act in assisting in the cleaning of the oil breather cap from a fellow employee's car during the lunch period was a reasonable

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activity, and that the risk inherent in such activity was a risk of the employment.

In the plaintiff's case, the plant environment contributed a distinct risk of injury to the employees on their rest break by virtue of the fact that a railroad track ran through the yard. Furthermore, the plaintiff's own conduct in spontaneously running toward a shiny, glittering object on the track along with his fellow employees was not unreasonable under the circumstances. The circumstances were these: they were free to engage in recreational activities during the rest breaks, but not generally free to leave the yard; there were no rules or regulations prohibiting running on the plant premises; running to the time clock at the end of the day was customary and plaintiff knew of no disciplinary action connected therewith. It can hardly be said that racing or running during a regular rest break is a departure or deviation from the course of employment, because plaintiff's assigned duties at that time were to take a break in the locked yard of the plant along with a large group of his fellow employees. Where an employer creates conditions under which the employees are treated as children in a school yard, the risk incident to these conditions is that they will so behave, and inevitably, some injuries will result.

Defendant argues that the connection between the accident and the employment is absent because the accident was caused by plaintiff's personal decision to run in competition with his fellow employees toward the shiny object in order to either claim the prize or satisfy his curiosity or both. In discussing the effect of a lull in work, Professor Larson, in 1A Larson, *supra*, § 23.65, p. 5-157 states:

If the primary test in horseplay cases is deviation from employment, the question whether the horseplay involved the dropping of active duties calling for claimant's attention as distinguished from the mere killing of time while claimant has nothing to do assumes considerable importance. There are two reasons for this: first, if there were no duties to be performed, there were none to be abandoned; and second, it is common knowledge, embodied in more than one old saw, that idleness breeds mischief, so that if idleness is a fixture of the employment, its handmaiden mischief is also.

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In the same section, at pages 5-161 and 5-162, Larson concludes with the following statement:

Injuries during lunch hour on the premises, since this interval usually includes some idle time, have been treated for this purpose like lulls in the work. Thus, a young employee was found to have remained in the course of his employment when he jumped on a coal chute as a lark during his lunch period, and compensation was awarded to a girl for injuries sustained while playfully riding on a hand truck during her lunch hour, although evidence of prior custom was a strong factor in the decision.

Of course, it would be going much too far to say that no horseplay enterprise undertaken during enforced idleness constitutes a deviation. But it is suggested that the idleness factor is relevant to this extent, that the duration and seriousness of the deviation which will be called substantial should be somewhat smaller when the deviation necessitates the dropping of active duties than when it does not.

Plaintiff's injury occurred during a regularly scheduled rest break. Even assuming *arguendo*, that the act of running or racing with his fellow employees towards a shiny object constitutes a "deviation" from his duty to take a rest break, under the circumstances such a deviation is hardly substantial or consequential enough to take his injury out of the scope of the Act's coverage.

As to the element of curiosity, Larson, *supra*, in Section 23.66, p. 5-162 states:

Closely similar in principle to participation in horseplay is deviation from the claimant's immediate employment path to satisfy his personal curiosity. The modern decisions tend to support the suggestion urged in this sub-section that if the deviation be trifling and momentary it should be disregarded like any other insubstantial deviation. Along with all the other frailties of the average man—his carelessness, his prankishness, his tobacco habit, his cola habit, his inclination to rest once in a while and chat with his neighbor—there must also be expected one more: his natural human proclivity for sticking his head in mysterious openings, putting fingers

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in front of fan blades, and pulling wires and pins on strange mechanical objects that he finds.

In the present case, there were no rules or regulations posted or furnished, in writing or orally, which prohibited running on the premises. Racing to the time clock was a repeated practice, apparently acquiesced in by the defendant employer. Plaintiff's act of running when a fellow employee in a crowded plant yard suddenly yelled, "What is that on the track," was a perfectly normal and instinctive human reaction. Plaintiff's impulsive running to satisfy his curiosity, if such it was, was not unreasonable under the circumstances and did not constitute a significant departure from the realm of accepted employee practices on the premises.

Our courts have upheld awards of compensation where the activities resulting in the injuries were not strictly in furtherance of a duty of the employment, but were considered a reasonable activity under the circumstances or a minor deviation only. See *Watkins v. City of Wilmington, supra*. See also, *Lee v. Henderson & Associates*, 284 N.C. 126, 200 S.E. 2d 32 (1973) (compensation award upheld where plaintiff's injury resulted from use of employer's electric saw and scrap material for an article for his personal use during the Saturday morning lull) and *Stubblefield v. Construction Co.*, 277 N.C. 444, 177 S.E. 2d 882 (1970) (employee's negligent act of striking at the objects on a moving conveyor belt with a pair of pliers in the performance of his duty of waiting for his foreman does not bar the right to compensation for the resulting accident).

In its brief the defendant employer cites a number of cases in support of its argument that the plaintiff's injury did not arise out of an incident of his employment. We have carefully examined these cases and find that they are clearly distinguishable from the present case. In conclusion, we hold that plaintiff's injuries arose out of and in the course of his employment, and the award of the Industrial Commission is

Affirmed.

Judges HILL and PHILLIPS concur.

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STATE OF NORTH CAROLINA v. PEARL JEAN McNEIL PORTER

No. 8310SC132

(Filed 15 November 1983)

1. Searches and Seizures § 10— search at airport—no seizure of defendant—reasonable suspicion defendant engaged in criminal activity

In a prosecution for trafficking in heroin, the trial court properly found defendant was not unconstitutionally seized by law enforcement officers at an airport where the evidence tended to show that defendant was approached by two or at most three law enforcement officers; she knew two of the officers and they did not use a threatening tone of voice or display a weapon; defendant consented to a search of her purse because she thought she had nothing to lose and had forgotten about hashish in her purse. Further, even if defendant was seized the agents clearly had a reasonable suspicion that defendant was engaged in criminal activity where the evidence tended to show that prior to defendant's arrest, an agent had received evidence from a reliable informant that defendant and/or her husband were bringing drugs into the airport from New York on Thursdays and Fridays; that defendant disembarked from a plane originating in New York on a Thursday; that before approaching defendant, the agent had learned that defendant was not listed on the passenger list for the flight and could conclude from this that she was traveling under an assumed name; and that she did not have a plane ticket with her and appeared to have no luggage.

2. Searches and Seizures § 10— warrantless seizure of suitcase—probable cause existing

In a prosecution for trafficking in heroin, an agent had probable cause to seize a brown leather suitcase from an Eastern Airlines unclaimed baggage area after hashish was discovered in defendant's purse where the agent had received reliable information that defendant was bringing drugs into the airport from New York on Thursdays and Fridays; hashish was found in defendant's purse after her voluntary consent to the search; defendant was traveling under an assumed name; the suitcase was tagged with the name Barbara Williams; and a passenger with the same name was listed on a passenger list as having cancelled an earlier New York flight and as having arrived on the later flight which was indicative of what defendant had done since her husband had been seen waiting for her at an earlier flight.

3. Criminal Law § 80.1— computer reservation printout—properly admitted into evidence

In a prosecution for trafficking in heroin, the trial court properly admitted into evidence an Eastern Airline's reservation computer printout for two flights arriving from New York City on 21 January 1982 where an employee from Eastern testified that he worked with the computer system, that the system is part of Eastern's business management service and that the information retained in the system is prepared in the regular course of business.

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4. Criminal Law § 60.5— fingerprint evidence—proper foundation laid

A proper foundation was laid for an expert in latent fingerprint identification to testify that fingerprints lifted from a suitcase matched those of an identification card bearing defendant's name where a witness testified that he fingerprinted defendant when she was arrested on the drug charges; and that the fingerprint card bears defendant's print and was forwarded to the SBI.

5. Narcotics § 4— trafficking in heroin—sufficiency of evidence

In a prosecution for trafficking in heroin, the trial court properly failed to dismiss the charge where the evidence tended to show that defendant was traveling under an assumed name; that she did not have any luggage; that the suitcase with heroin was tagged with the name "Barbara Williams"; that a passenger with this name had cancelled a reservation on the afternoon New York flight and arrived on the evening flight; that "Barbara Williams" was paged but no one claimed the suitcase; that defendant's fingerprints were lifted from the unclaimed suitcase; that defendant's fingerprints were found on some of the contents of the suitcase and that one of the officers recognized the nightgown in the suitcase as identical to one he had seen on defendant prior to 21 January 1982.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 24 September 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 18 October 1983.

On the evening of 21 January 1982 defendant was questioned by law enforcement officers at Raleigh-Durham Airport. After conferring with defendant, the officers searched her purse and a suitcase identified as belonging to defendant. As a result of these searches defendant was charged with misdemeanor possession of hashish and trafficking in heroin. She pleaded guilty to the misdemeanor and was fined \$100. A jury found defendant guilty of trafficking in heroin, and the trial court sentenced her to 18 years.

Attorney General Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the State.

Loflin & Loflin, by Thomas F. Loflin, III and Robert S. Mahler for defendant appellant.

ARNOLD, Judge.

The first question before this Court is whether the trial court erred in denying defendant's pretrial motions to suppress the hashish found in defendant's purse, the heroin found in the suitcase and all statements made by defendant after the law enforcement officers approached her. Defendant further questions the

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admission of certain evidence at trial, the sufficiency of the evidence to support her conviction and the constitutionality of the sentencing provisions in G.S. 90-95. After careful consideration of these assignments of error, we conclude that defendant received a fair trial free from prejudicial error.

Prior to trial, defendant moved to suppress evidence of the hashish as well as the heroin found in the suitcase on the grounds that both her purse and suitcase were illegally searched and seized. After conducting an evidentiary hearing on these matters, the trial court made detailed findings of fact and concluded that the controlled substances were admissible into evidence.

[1] Defendant first argues that she was unconstitutionally seized by law enforcement officers at the door of the airport terminal; that her acquiescence to SBI Agent Turbeville's request to search her purse was coerced by her illegal seizure and that the hashish seized from her purse was tainted by this illegal seizure and that the trial court therefore erred in declaring the hashish admissible evidence.

This Court's scope of review of an order denying motions to suppress evidence is "whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E. 2d 618, 619 (1982). We conclude that the trial judge here made findings of fact amply supported by the evidence; and that these findings of fact support admission of the seized contraband.

These findings of fact are summarized below:

Terry Turbeville has been a drug agent for 7 years and has worked at the Raleigh-Durham Airport (hereinafter Airport) with the Drug Interdiction Unit since October 1981. During the first part of January 1982, Turbeville received information from Det. Jimmy Privette of the Raleigh Police Department that defendant and/or her husband, Elbert Porter, were bringing heroin into the Airport from New York City. Det. Privette indicated that the couple was transporting the drugs on their person or in their luggage; and that they usually traveled during the latter part of the week. He pro-

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vided Turbeville with photographs of several persons, including the defendant. Also during the first part of January 1982, Turbeville met with a confidential informant. He asked the informant if he knew or had heard anything about narcotics coming through the Airport. The informant said, "You know about Pearl and Elbert?" Turbeville replied that he did not. The informant then continued, "You know they've been bringing it through Raleigh-Durham and usually come back on Thursday and Friday." This informant had always given Turbeville reliable information. In fact, he had given Turbeville information regarding drugs and seizures of drugs 3 or 4 times.

On 21 January 1982 Turbeville was working at the Airport. While waiting at the Eastern Airlines gate for a 4:00 p.m. flight from New York, Turbeville spotted Elbert Porter and another man. The two men appeared to be waiting for someone, but no one met them when the plane arrived. After checking at the Eastern ticket counter, the two men left.

Sometime after 4:00 p.m. Turbeville called Det. Privette and informed him that Elbert had been at the Airport and appeared to be waiting for someone. He told Privette that the next scheduled flight from New York was 9:00 p.m. and requested police assistance for this flight.

By 8:30 p.m. 7 law enforcement officers were awaiting the arrival of the 9:00 p.m. flight. When the plane landed, defendant disembarked and entered the lobby of the terminal. She was carrying a purse and box. As the defendant passed through the main lobby she handed the box to the gentleman who had accompanied Elbert to the Airport. No words were exchanged. As defendant neared the exit of the lobby, the man returned the box to her and headed toward the baggage area. Sgt. Peoples of the Raleigh Police Department then approached defendant identified himself and said, "How are you doing Pearl?" Turbeville approached defendant from behind, introduced himself and showed defendant his SBI credentials. Turbeville then asked defendant for her plane ticket. She responded that she must have left it on the plane. At this time people were gathering around and going in and out of the lobby. Turbeville asked defendant if she

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would like to go to his office and continue looking for identification. Defendant said okay. Before the 9:00 p.m. flight Turbeville had checked with Eastern Airlines and had discovered that defendant's name was on neither passenger list for the flights originating in New York.

When defendant reached Turbeville's office, Turbeville informed her that he was conducting a narcotics investigation and would like her cooperation. He then asked if he could look into her purse. Defendant said yes and handed the purse to him. Turbeville asked defendant if she had check-on luggage and she replied that she did not. Turbeville discovered a tinfoil packet in defendant's purse. He opened the packet, showed it to Det. Liggins and asked, "What's this?" Defendant replied, "That is 'Hash!' I forgot that it was in there."

While in the office Turbeville was informed by an officer that a suitcase tagged "Barbara Williams" had been left on the baggage platform. Turbeville had previously learned that a Barbara Williams was listed as a passenger who missed the 4:00 p.m. flight and as a passenger on the 9:00 p.m. flight. Turbeville had Barbara Williams paged and no one responded. He also checked the telephone book and called a Barbara Williams listed therein. This person indicated she had no luggage at the Airport. Turbeville showed defendant this suitcase and she denied that it was hers. Defendant was then arrested for possession of hashish. She indicated she wanted a lawyer and no further questions were asked. Defendant was taken before a magistrate. After a warrant for the misdemeanor was issued, defendant was released on bond.

At 2:04 a.m. on 22 January 1982, Turbeville and Det. O'Shields obtained a search warrant to search the suitcase. Plastic bags containing 27.9 grams of heroin were found inside.

At no time was defendant given the *Miranda* warnings. Turbeville testified that he would not have let defendant leave the Airport after he stopped her at the exit door. No one told defendant she had a right to leave without conferring with the officers. None of the officers present at the Airport were wearing uniforms and no weapons were ever

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displayed. Defendant testified that she knew 2 of the officers; that she did not believe she was free to leave and that she forgot she had hashish in her purse.

Based upon these findings of fact the trial court concluded:

10. Agent Turbeville, at the time of the defendant disembarking from New York Kennedy flight on Eastern Airlines at 9:00 p.m. had a reasonable suspicion of criminal activity that involved illicit drugs arriving at the Raleigh-Durham Airport with someone connected with Elbert Porter; that Pearl Porter, wife of Elbert Porter, could probably be one of the persons engaged in the criminal activity based on information given the agent by the confidential informant and Detective Privette; that Agent Turbeville made a legitimate, temporary, detention of the defendant in the process of accosting her in the lobby of the airport terminal and subsequently asking her if she would go to the office; that the defendant readily went with the officers to the office, forty feet away, in a spirit of voluntary cooperation, she believing that as of that time she had nothing to lose, or fear; that the consent to the search of the pocketbook was in the same spirit of voluntary cooperation, she believing at the time that she had nothing to fear or lose. There is exceptionally clear evidence of consent.

. . . .

12. All the believable testimony, and the totality of all the circumstances, point to the one conclusion that Agent Turbeville had probable cause to believe that the defendant was trafficking in some form of illicit narcotic drugs, controlled substances. He had a reasonable suspicion, based on articulable and objective facts, that Pearl Porter was involved in criminal activity.

The judge further concluded:

The defendant consented to the search of her pocketbook because she thought she had nothing to lose. She had a genuine momentary lapse of memory that she still had any hash in her purse. It was the heroin she was worried about, and none of it was on her person, or checked as luggage in her

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name, nor within her reach or grasp, as she was accosted in the lobby, and while she was inside the office with the officers.

The findings of fact show and the trial judge properly concluded that defendant's first encounter with the officers at the Airport was an investigative stop and not a seizure. In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968), the United States Supreme Court established that a reasonable investigative stop did not offend the Fourth Amendment. In a recent airport search and seizure case, the Court concluded that federal agents' conduct in initially approaching the respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of *Terry*. *U.S. v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S.Ct. 1870 (1980). The facts and language in this case are pertinent to our determination of the case on appeal.

In *Mendenhall*, agents observed a woman whose conduct appeared to be characteristic of persons unlawfully carrying narcotics. The agents approached her, identified themselves as federal agents and asked to see identification and an airline ticket. The agents noted a discrepancy between the names on her driver's license and ticket. They returned the items to her and asked if she would accompany them to their office. She agreed. She also consented to a search of her purse after the agents told her she had a right to decline the search. *Mendenhall* later consented to a search of her person. Drugs were discovered in her underclothing. The Court concluded that on these facts no "seizure" occurred. The Court noted:

The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement

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official (citations omitted). In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the course and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure.

Id. at 510. The Court concluded "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 509.

In the case on appeal, defendant was approached by two or at the most three law enforcement officers. She knew two of the officers and they did not use a threatening tone of voice or display a weapon. The evidence further showed, and the trial court found, that defendant consented to the search of her purse because she thought she had nothing to lose. She simply forgot about the hashish in her purse.

We note that the trial court concluded that even if defendant was seized at the Airport, her seizure was not unlawful. Any seizure must at least be supported by reasonable and articulable suspicion that the person seized is engaged in criminal activity. *Reid v. Georgia*, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980). The evidence shows that Agent Turbeville clearly had a reasonable suspicion that defendant was engaged in criminal activity.

Several weeks prior to defendant's arrest, Turbeville had received evidence from a reliable informant that defendant and/or her husband were bringing drugs into the Airport from New York on Thursdays or Fridays. As predicted by this informant, defendant disembarked from a plane originating in New York on a Thursday. Before approaching defendant, Turbeville had learned that defendant was not listed on the passenger list for the flight and could conclude from this that she was traveling under an assumed name. She did not have a plane ticket with her and appeared to have no luggage. Since defendant voluntarily consented to the search of her purse while being justifiably detained on reasonable suspicion, the hashish recovered in the search is admissible against her.

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[2] Defendant next argues that the warrantless seizure of the brown leather fold-up suitcase tagged with the name Barbara Williams was unconstitutional. The suitcase was seized from Eastern Airlines' unclaimed baggage area after hashish was discovered in defendant's purse.

In a recent decision, the U.S. Supreme Court held that *Terry* principles could be applied to justify a warrantless seizure of baggage on less than probable cause. *U.S. v. Place*, --- U.S. ---, 77 L.Ed. 2d 110, 103 S.Ct. 2637 (1983). Place was stopped by law enforcement officers because of his suspicious behavior. After he refused to consent to a search of his luggage, the agents informed him that they were taking the suitcase to a federal judge to obtain a search warrant. The agents instead transported the suitcase from New York's LaGuardia Airport to Kennedy Airport where a "sniff test" by a narcotics detection dog proved positive. Ninety minutes had elapsed since the seizure of the luggage. The Court held that the drugs obtained from the subsequent search of the luggage was inadmissible because of the length of detention of Place's luggage.

Unlike the facts in *Place*, Agent Turbeville had probable cause to seize the brown leather suitcase pending issuance of a search warrant to examine its contents. The information received from the reliable informant, the hashish found in defendant's purse after her voluntary consent, the evidence that defendant was traveling under an assumed name, the evidence that the suitcase was tagged with the name Barbara Williams, and the evidence that a passenger with the same name was listed on the passenger lists as having cancelled the earlier New York flight and arriving on the later flight clearly gave the officers probable cause to seize the suitcase.

The trial judge concluded that since defendant denied that the luggage was hers, she had no standing to object to the search of her suitcase following its seizure. Defendant excepts to this conclusion. Because the search was conducted pursuant to a properly issued search warrant the conclusion that defendant had no standing to object to the search is not material to the court's decision to deny suppression of evidence seized from the search.

[3] Defendant argues that the trial court erred in admitting into evidence Eastern's reservation computer printout for the two

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flights arriving from New York City on 21 January 1982. She bases this assignment of error on the State's failure to lay a proper foundation. We find no support for this argument.

Robert Taylor, an employee with Eastern, testified that he works with the computer system; that the system is part of Eastern's business management service and that the information retained in the system is prepared in the regular course of business. After briefly explaining how information is placed in the computer, Taylor testified that Agent Turbeville approached him on 21 January 1982 and requested information on the two Eastern flights from New York arriving that day. Taylor made a printout of the two passenger lists showing reservations and cancellations. At trial Roberts identified copies of these printouts he had made for Turbeville. The State, through Taylor's testimony, laid a proper foundation for the introduction of the computer printouts. See *State v. Springer*, 283 N.C. 627, 197 S.E. 2d 530 (1973).

[4] Defendant's argument that the State failed to lay a proper foundation for the admission of fingerprint evidence is also without merit. Agent Neuner, an expert in latent fingerprint identification, testified that on 22 January 1982 he examined the suitcase and its contents for fingerprints. He compared the fingerprints lifted from these items with a fingerprint identification card bearing defendant's name and found that some of the latent fingerprints matched those on the card.

Defendant specifically argues that no foundation was laid for this testimony, because no witness identified defendant as the person who made the inked impression on the fingerprint card. Defendant has obviously overlooked the testimony of an employee of the City-County Identification Unit. This witness testified that he fingerprinted defendant when she was arrested on the drug charges; and that the fingerprint card bears defendant's print and was forwarded to the SBI.

[5] Defendant has assigned error to the trial court's failure to dismiss the charge of trafficking in heroin. She contends that the fingerprint evidence was unsubstantial; and that Eastern Airlines had sole and exclusive possession of the suitcase containing the heroin.

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When considering a motion to dismiss for insufficient evidence, the court must consider all the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference to be drawn from the evidence. The evidence, when viewed in this light, shows that defendant was traveling under an assumed name; that she denied having any luggage; that the suitcase was tagged with the name "Barbara Williams"; that a passenger with this name had cancelled her reservation on the afternoon New York flight and arrived on the evening flight; that "Barbara Williams" was paged but no one claimed the suitcase; that defendant's fingerprints were lifted from the unclaimed suitcase; that defendant's fingerprints were found on some of the contents of the suitcase and that one of the officers recognized a nightgown in the suitcase as identical to one he had seen on defendant prior to 21 January 1982. We find no error in the failure to grant defendant's motion.

In defendant's final assignment of error, she attacks the constitutionality of G.S. 90-95(h)(4), (5) and (6). This same argument was posed by defendant's attorney in *State v. Willis*, 61 N.C. App. 23, 300 S.E. 2d 420 (1983), wherein this court concluded that these statutes are not violative of the United States or North Carolina Constitutions.

No error.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. ERIC COLEMAN

No. 8216SC1239

(Filed 15 November 1983)

1. Burglary and Unlawful Breakings § 1— elements of first degree burglary

The elements of burglary in the first degree are: (1) the breaking (2) and entering (3) at night (4) into a dwelling house or room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein.

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2. Burglary and Unlawful Breakings § 5— first degree burglary—sufficiency of evidence

The State's evidence was sufficient for the jury to find a nonconsensual entry and an intent to commit larceny so as to support the conviction of defendant for first degree burglary where it tended to show that defendant opened a window and crawled through it into an occupied home at 4:30 a.m.; an occupant watched defendant walk toward various rooms in the home; and when such occupant began to scream, defendant first tried to choke her and then fled.

3. Criminal Law § 122.1— additional instructions—failure to repeat instruction on not guilty verdict

The trial judge, in giving additional instructions at the jury's request, did not err in failing to repeat his instruction that the jury could return a verdict of not guilty.

4. Criminal Law § 99.5— trial judge's admonishment of counsel—absence of prejudice

Defendant was not prejudiced when the trial judge, prior to trial and in the presence of the jury panel, admonished defendant's counsel about his absence when other cases in which he was involved had been called for trial. Nor was defendant prejudiced by the trial judge's remarks when he denied defense counsel's motion to be relieved from representing defendant.

Judge PHILLIPS concurring.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 18 May 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 19 September 1983.

Defendant was charged in a bill of indictment with first degree burglary. From a jury trial convicting defendant of burglary as charged, defendant appeals.

The State's evidence tended to show: Vanessa Wallace testified that on 27 December, sometime between 4:00 and 4:30 a.m., she was lying awake in bed when she saw someone moving in the house outside her bedroom. She watched this person walk toward various rooms, including her own bedroom, where he stopped and peered in. He was carrying a towel that belonged in her household. Vanessa recognized the intruder as the defendant and began to scream. Defendant started choking her, then stopped and fled.

Jacquelyn Wallace testified that she was in bed, in the same bedroom as her sister, Vanessa, when she heard something on the couch in the living room. A short time later, she awoke to her

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sister Vanessa's screams and saw defendant run from their bedroom.

Mr. Wallace also awoke to his daughter's screams. He testified that he got up and saw someone run from their house toward defendant's house about two blocks away. Mr. Wallace noticed mud on their living room couch, which had not been there previously. The couch was directly in front of a window.

Ruben Wallace, Jr., slept on the living room couch the evening of the break-in. He testified that before he went to sleep, he had taken some medicine for a cold which made him drowsy. He did not awaken until he heard his sister scream. He, too, noticed some dirt on the couch that was not there when he had gone to sleep. He testified that the window above the couch was closed when he went to sleep.

Police Officer Terry Hunt received a call at around 4:30 a.m. and went to the Wallace residence. Once there, he testified that he noticed the window above the living room couch was raised. Upon being advised that defendant had been in the house, Officer Hunt went to defendant's residence and saw defendant in the back of the room changing his shirt. Defendant's parents were upset, so the Officer called for assistance.

Deputy Sheriff Cynthia Floyd responded to the call and went to the Wallace residence. She testified that she, too, noticed that the window above the living room couch was raised and that there was mud on the couch. Deputy Floyd then went to defendant's house and placed defendant under arrest.

On 27 December at around 7:30 p.m., Vanessa and Jacquelyn Wallace gave statements to Ms. Floyd and another detective that substantially corroborated their testimonies at trial.

The defendant's evidence tended to show: Defendant testified that he, his friend, Calvin McNair, and his girlfriend, Antonia Mickins, were together on the evening of 26 December and early morning of 27 December. At around 3:00 a.m., they went to Lumberton to visit Antonia's brother. They stayed until around 4:30 a.m. Defendant then drove Antonia home and arrived at his own home at around 5:00 a.m.

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Calvin McNair testified that he was with defendant on the evening of 26 December and the morning of 27 December until around 3:00 a.m.

Antonia Mickins testified that she was with defendant on the evening of 26 December and the morning of 27 December until 4:55 a.m. when defendant brought her home from her brother's house.

James Mickins, Antonia's brother, testified that sometime after 1:00 a.m. on 26, 27 or 28 December, Antonia and defendant stopped by and visited for about an hour to an hour and a half.

Mrs. Coleman, defendant's mother, testified that defendant was not at home when Officer Hunt came over looking for him, but that he came home some time thereafter.

On rebuttal, the State's evidence tended to show: Mrs. Mickins, Antonia's mother, testified that her daughter arrived home at around 1:00 a.m. on 27 December. Mrs. Mickins heard no one enter or leave the house after 1:00 a.m.

The jury found defendant guilty of burglary as charged, the intended felony therein being larceny.

Attorney General Edmisten, by Frank P. Graham, Assistant Attorney General, for the State.

Regan and Regan, by John C. B. Regan, III, for defendant appellant.

VAUGHN, Chief Judge.

Defendant contends that the trial court erred in failing to grant his motion for a directed verdict of not guilty at the close of the State's evidence. We find no merit in defendant's contention. Upon a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, with every reasonable inference or intendment drawn in its favor. *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981); *see also State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977). If there is any evidence tending to prove defendant's guilt or which reasonably leads to that conclusion as a logical and legitimate deduction, it is for the jury to say whether it is convinced beyond a reasonable

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doubt of defendant's guilt. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1976). We think the evidence presented by the State in this case was ample to show that the crime was committed and that defendant was the perpetrator. Any contradictions or discrepancies in the evidence were matters for the jury and do not warrant a directed verdict. *See id.*

[1] The elements of burglary in the first degree are: (1) the breaking (2) and entering (3) at night (4) into a dwelling house or room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony (i.e. larceny) therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976). To withstand defendant's motion, the State must prove all of the essential elements of the offense. *See State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). Defendant contends that the State did not sufficiently prove two elements of its charge of first degree burglary.

[2] Defendant, first, contends that the State failed to prove a nonconsensual entry. As proof of consent, defendant offers testimony of Mr. Wallace that he thought defendant had been to his house before to play ball with his boys. We fail to see how previous consent shows consent in the instant case. Here, the evidence showed that at around 4:30 a.m. defendant opened a window and crawled through to the Wallace home. Upon seeing defendant, one of the occupants screamed, and defendant fled. From such evidence, the jury could and did draw the conclusion that defendant's entrance was nonconsensual. The moving and raising of the window constituted a nonconsensual entry, i.e., a breaking. *See State v. Wells, supra.*

Defendant also contends that the State did not prove defendant's intent to commit larceny. To establish this element, the State need not prove that larceny was actually committed. It is, furthermore, unnecessary to allege that defendant intended to steal a specific item of property. *State v. Hooper*, 227 N.C. 633, 44 S.E. 2d 42 (1947). In this case, defendant did not complete the crime of larceny, and, therefore, his intent must be inferred from the evidence.

The evidence showed that defendant broke into and entered the Wallace home at around 4:30 a.m. and that when one of the occupants began screaming, he first tried to choke her and then

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fled. While defendant's actions could be subject to more than one interpretation, it is the function of the jury, not the Court, to infer defendant's intent from the circumstances.

The trial judge properly instructed the jury: "The State must prove beyond a reasonable doubt . . . that at the time of breaking and entering, defendant intended to commit a felony. In this case, the State's contention is . . . the felony of larceny." The jury, given proper instructions, must determine defendant's intent at the time he forced entrance into the house. *State v. Thorpe*, 274 N.C. 457, 164 S.E. 2d 171 (1968). In *State v. Accor* and *State v. Moore*, 277 N.C. 65, 74, 175 S.E. 2d 583, 589 (1970), the Court quoted with approval the following from *State v. McBryde*, 97 N.C. 393, 397, 1 S.E. 925, 927 (1887):

The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the nighttime, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the nighttime, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent.

Such was the inference drawn by the jury in the instant case.

[3] Defendant, next, contends that the trial court erred when the jury requested additional instructions and the judge did not repeat his instruction that they could return a verdict of not guilty. This contention is without merit. The judge, in the instant case, properly instructed the jury on all the essential elements of the charge. Upon request for a repetition of instructions on a particular point, a judge is not required to repeat his entire charge. *State v. Dawson*, 278 N.C. 351, 180 S.E. 2d 140 (1971). At trial, defendant did not request the judge to repeat his instruction regarding a verdict of "not guilty." "[W]hen the trial judge has instructed the jury correctly and adequately on the essential features of the case but defendant desires more elaboration on any point, then he should request further instructions; otherwise,

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he cannot complain." *State v. Wilkins*, 297 N.C. 237, 245, 254 S.E. 2d 598, 603 (1979).

[4] In his last two assignments of error, defendant argues that the trial judge's admonishment of trial counsel (he was not then represented by his present counsel) prior to trial and his manner of denying counsel's motion, at the request of defendant, to be relieved, prejudiced the jury and denied defendant a fair trial.

The judge's duty of absolute impartiality has been reiterated by our courts many times. As stated by the Supreme Court in *State v. Holden*, 280 N.C. 426, 429, 185 S.E. 2d 889, 892 (1972): "Jurors respect the judge and are easily influenced by suggestions, whether intentional or otherwise, emanating from the bench. Consequently, the judge 'must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury, '" *quoting State v. Carter*, 233 N.C. 581, 583, 65 S.E. 2d 9, 10 (1951). The judge's duty of impartiality extends to defense counsel. He should refrain from remarks which tend to belittle or humiliate counsel since a jury hearing such remarks may tend to disbelieve evidence adduced in defendant's behalf. *Id.*

In this case, prior to trial, in front of the jury panel, the judge admonished defendant's counsel for his prior absences when his cases were scheduled for trial:

THE COURT: Mr. Swann, you have cases, to my knowledge, in which you were not present or have been out of place when the cases were called for trial. Last week you had nine cases on the calendar—some for arraignment, some for trial. We heard from your secretary that you were involved in another matter in Cumberland County, but never could verify that with you.

I'm tired of it. I'm not going to put up with it anymore. I have given serious thought to citing you to show cause whether you should not be held in contempt of this Court, and have decided not to do that.

Although we do not condone the judge's admonishment and criticism in the presence of the jury panel, it must be viewed in light of all the facts and circumstances. *See State v. Gibson*, 233 N.C. 691, 65 S.E. 2d 508 (1951); *State v. Blue*, 17 N.C. App. 526,

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195 S.E. 2d 104 (1973). Not every ill-advised expression by the trial judge has such harmful effect as to require a reversal. *State v. Holden, supra*. In this case, the judge's comments occurred two hours before trial and had nothing to do with the merits of defendant's case. We do not find that such comments prejudiced the defendant. "The 'bare possibility' that defendant may have suffered prejudice is not enough to overturn a guilty verdict." *State v. Norris*, 26 N.C. App. 259, 263, 215 S.E. 2d 875, 877, *cert. denied, appeal dismissed*, 288 N.C. 249, 217 S.E. 2d 673 (1975), *cert. denied*, 423 U.S. 1073, 96 S.Ct. 856, 47 L.Ed. 2d 83 (1976).

Defendant also contends that the judge's remarks when he denied defense counsel's motion to be relieved prejudiced defendant, denying him a fair trial. When defense counsel moved to withdraw, the judge, after some discussion with the district attorney, asked the district attorney if he was "ready to go to bat." When the district attorney responded affirmatively, the judge told him to call his case. The following exchange then occurred:

DEFENSE COUNSEL: Does that mean the motion is denied, your Honor?"

THE COURT: "I have not relieved you . . ."

We fail to see how defendant was prejudiced from the judge's comments. The judge, in ruling on counsel's motion, exercised his discretionary power. Absent an abuse of discretion, such ruling is not subject to review. *Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E. 2d 22 (1967). We find no abuse of such discretion nor any prejudice resulting to defendant warranting a reversal.

No error.

Judges WHICHARD and PHILLIPS concur.

Judge PHILLIPS concurring.

Though I agree that no prejudicial legal error was committed during the course of the trial and that another trial would almost certainly end as this one did, I see no semblance of an excuse for the trial judge berating defendant's lawyer in open court before the panel of jurors from which those who decided his case were

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selected. Whether the judge had cause for being upset with the lawyer is beside the point; the judge's grievance, according to his own remarks, did not develop before the jury, but had existed for some time, and should have been addressed in chambers, out of the panel's presence. The lawyer was not in court for himself; he was there only to act for defendant and his other clients. By gratuitously demeaning the lawyer, the judge also demeaned the defendant to some extent. Which is why trial judges should refrain from airing their complaints against lawyers in the presence of jurors the lawyers will soon be contending before. If the contest between the State and defendant had been closer, I would find it difficult, indeed, not to find prejudicial error.

STATE OF NORTH CAROLINA v. NATHANIEL SALTERS

No. 8214SC1364

(Filed 15 November 1983)

1. Burglary and Unlawful Breakings § 5.6— felonious breaking or entering—sufficiency of evidence—sufficient evidence of larceny

The evidence was sufficient to support a charge of felonious breaking or entering of a vacant apartment even though the evidence of defendant's intent to commit larceny was circumstantial where the evidence tended to show that defendant was apprehended after attempting to flee a vacant apartment to which officers had been called to investigate; a stove and refrigerator of the apartment were found in the living room; a bag and some tools were found on the floor; wood chips were observed around the door as well as damage to the door around the lock; and a rental agent for the apartment indicated that the apartment was equipped with a stove and refrigerator.

2. Criminal Law § 138— cooperation with police—failure to find as mitigating factor—no abuse of discretion

There was no abuse of discretion by the trial judge in failing to find as a mitigating factor that defendant cooperated with the police in disclosing the name of his unapprehended accomplice and the location of their van since the individual named by defendant did not fit the description by an eyewitness and no one was apprehended as the result of defendant's information. G.S. 15A-1340.4(a)(2)(h).

3. Criminal Law § 138— failure to consider alcoholism and impaired vision as mitigating factors—no link between condition and culpability—no error

A trial judge was not required to consider as mitigating factors that defendant was an alcoholic and that defendant suffered from glaucoma which

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significantly impaired his vision where defendant failed to establish the essential link between defendant's condition and his culpability for the offense charged. G.S. 15A-1340.4(a)(2)d.

4. Criminal Law § 138— Fair Sentencing Act—sentence within discretion of judge

In a prosecution for felonious breaking or entering, the trial court did not abuse its discretion by imposing an eight year sentence even though the sole aggravating factor found was defendant's prior convictions since no mitigating factor was found and since except for maximum sentence limitations in G.S. 14-1.1, the severity of a sentence imposed pursuant to the Fair Sentencing Act, insofar as it is based on a weighing of aggravating and mitigating factors, is within the discretion of the judge. G.S. 14-1.1(a)(8); G.S. 14-54(a) and G.S. 15A-1340.4(e).

APPEAL by defendant from *Preston, Judge*. Judgment entered 29 July 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 September 1983.

Defendant was charged with the offenses of felonious breaking or entering, attempted larceny, and possession of house-breaking implements. He was convicted of felonious breaking or entering, the other charges having been dismissed at the close of the State's evidence.

Evidence presented by the State at trial tended to show the following:

On the evening of 7 April 1982, the Durham Police Department received a call from a person who reported a possible break-in in progress at a vacant neighboring apartment. Two officers responded to the call and, after speaking with the complainant, approached the apartment in question. One officer observed two men in the apartment through a rear window and started around to the front. The other officer, with the aid of a flashlight, observed two men through a front window, whereupon the men fled. They were observed leaving the apartment through a rear window by the first officer, who had returned to the back. The officer apprehended one of the men, defendant Nathaniel Salters. The other person eluded the officers and was not apprehended.

After the arrest, one officer entered the apartment and found a stove and refrigerator in the living room. He also found a bag and some tools on the floor. He observed wood chips around the door and damage to the door around the lock. The rental agent

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for the apartment indicated that the apartment was equipped with a stove and refrigerator and that maintenance personnel had had access to the apartment while it was vacant. The State was not able to prove that the stove and refrigerator had been moved by defendant or his alleged accomplice.

Defendant presented no evidence but renewed his motion to dismiss as to the remaining felonious breaking or entering charge. The motion was denied and the jury returned a verdict of guilty. Defendant made a motion for appropriate relief which was denied.

From judgment and sentence entered on the verdict, defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

M. Lynette Hartsell for defendant appellant.

EAGLES, Judge.

[1] Defendant contends that it was error for the court to deny his motion to dismiss as to the charge of felonious breaking or entering. Defendant argues that the evidence was insufficient to support a charge of felonious breaking or entering. Specifically, defendant asserts that the circumstantial evidence presented by the State fails to establish sufficiently the larcenous intent necessary to support the charge.

In a motion to dismiss, the question presented is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). In order to withstand a motion to dismiss, the State's evidence as to each element of the offense charged must be substantial. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Substantial evidence in this context means more than a scintilla. *Id.*; see *State v. Weinstein*, 224 N.C. 645, 31 S.E. 2d 920, 156 A.L.R. 625 (1944) *cert. denied sub nom. Weinstein v. State*, 324 U.S. 849, 65 S.Ct. 689, 89 L.Ed. 1410 (1945) (same test in motion for nonsuit). The evidence, considered in the light most favorable to the State and indulging every in-

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ference in favor of the State, must be such that a jury could reasonably find the essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560, *reh. denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed. 2d 126 (1979); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981). "The test of the sufficiency is the same whether the evidence is circumstantial or direct, or both." *State v. Jones*, *supra* at 504, 279 S.E. 2d at 838.

The intent required to support a charge of felonious breaking or entering is the intent to commit a felony of larceny in the premises unlawfully entered. G.S. 14-54(a). Evidence tending to show an unexplained breaking or entering into a dwelling at night, accompanied by flight when discovered, is sufficient under the law to support the inference that the breaking or entering was done with the intent to steal or commit a felony. *State v. Accor*, 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887); *State v. Hill*, 38 N.C. App. 75, 247 S.E. 2d 295 (1978). The intent inferred is sufficient under the law to support a charge of felonious breaking or entering and warrant its submission to the jury. *State v. Hill*, *supra*. See generally 4 N.C. Index 3d, Criminal Law, §§ 104-106.2 (1976).

Here, the evidence of defendant's intent to commit larceny is circumstantial. In the absence of a confession or completion of the intended offense, intent is most often proven by circumstantial evidence. Defendant notes that usually cases in which intent is inferred from circumstantial evidence involve stores or occupied dwellings and arguably provide a stronger basis for inferring intent. While the premises involved in this case was a vacant apartment, the distinction is not significant. Defendant's intent at the time of the breaking or entering is the essential element. *State v. Hill*, *supra*. The record here shows sufficient evidence to support an inference that defendant had the requisite intent, regardless of whether he was able to carry it out. Defendant's contention is without merit.

Upon conviction of felonious breaking or entering, a class H felony, defendant was sentenced to a term of eight years imprisonment. Under the Fair Sentencing Act, a class H felony carries a presumptive prison term of three years. Where, as here, the sentence imposed exceeds the presumptive term, the Fair Sentencing Act imposes the following requirement:

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[T]he judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. If he imposes a prison term that exceeds the presumptive term, then he must find that the factors in aggravation outweigh the factors in mitigation,

....

G.S. 15A-1340.4(b). The judgment here shows the following findings, as required by the Fair Sentencing Act: (1) that defendant's prior record of criminal convictions was an aggravating factor, (2) that there were no mitigating factors, (3) that the factors found were supported by a preponderance of the evidence, and (4) that the factors in aggravation outweighed the factors in mitigation.

[2] Defendant assigns as error the sentencing judge's failure to find and consider several statutory mitigating factors which defendant contends were proven by a preponderance of the evidence. Specifically, defendant contends that his cooperation with the police in disclosing the name of his unapprehended accomplice and the location of their van should have been considered by the judge as a mitigating factor within the scope of G.S. 15A-1340.4(a)(2)(h):

"The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony."

In support of his contention, defendant relies on a statement made by the district attorney at the sentencing hearing. The district attorney noted to the court that the defendant had provided the police with the name of an individual that he alleged to be his accomplice and that defendant had disclosed the location of the van. The individual named by defendant, however, did not fit the description given by an eyewitness and no one was apprehended as a result of defendant's information. Defendant did not testify on behalf of the State in any other felony prosecution. This alleged cooperation by defendant was not a factor required to be considered in mitigation of the sentence.

Under the statute, the judge *may* consider non-statutory factors in mitigation if they are supported by a preponderance of the evidence and are reasonably related to the purposes of sentencing. *State v. Aaron Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983); *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983);

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State v. Teague, 60 N.C. App. 755, 300 S.E. 2d 7 (1983). The judge in the instant case, if he found that defendant's conduct was cooperative, though not sufficient to fit within G.S. 15A-1340.4(a)(2)(h), could have considered it as a factor in mitigation of his sentence. In electing not to do so, the judge acted properly and did not abuse his discretion. Defendant's contention is therefore without merit.

[3] Defendant also contends that the trial court should have considered defendant's alcoholism and impaired vision (glaucoma) as factors in mitigation of his sentence. The State responds that it is "not clear" that the existence of these conditions is supported by a preponderance of the evidence and that their relation to the purposes of sentencing is likewise "not clear." The State has cited no pertinent authority in support of its position.

G.S. 15A-1340.4(a)(2)(d) includes the following mitigating factor:

(d) "The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense."

Uncontradicted testimony at the sentencing phase of defendant's trial shows that defendant was an alcoholic and did suffer from glaucoma, which significantly impaired his vision. The judge recommended that defendant be treated for these problems, indicating that the testimony was credible. However, defendant did not allege or prove that either of his afflictions in any way reduced his culpability for the offense of felonious breaking or entering.

While a mental or physical condition, such as alcoholism, may be capable of reducing a defendant's culpability for an offense, see *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. Defendant has the burden of proof with respect to any alleged mitigating factors. *State v. Aaron Jones*, *supra*. Here, defendant has failed to establish the essential link between defendant's condition and his culpability for the offense. We hold that the judge was not required to consider either condition as a mitigating factor in this case. *State v. Aaron Jones*, *State v. Melton*, *State v. Teague*, all *supra*.

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[4] Defendant also assigns as error the imposition of the eight year sentence. Defendant contends that the sole aggravating factor found, his prior convictions, is not sufficient to support the imposition of a sentence five years in excess of the presumptive term. The maximum allowable term for a conviction of felonious breaking or entering is ten years. G.S. 14-1.1(a)(8); G.S. 14-54(a). In support of this contention, defendant cites *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982), in which the defendant was convicted of felonious breaking or entering and sentenced to a prison term of eight years. In *Massey*, the sole aggravating factor was a prior criminal record more extensive than defendant's record here. Defendant argues that, because the record in *Massey* was more "egregious," the sentence here should be less severe. We disagree.

Massey is distinguishable from the present case on the grounds that the court there found and considered a mitigating factor. No mitigating factor exists here. However, even if *Massey* were factually indistinguishable from the present case, it would not control the decision here. It is already well established that the weight attached to particular aggravating or mitigating circumstances in a case is within the discretion of the trial judge. *State v. Melton*, *State v. Massey*, both *supra*; *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). The eight year sentence imposed was within the ten year maximum allowed under the statute. Defendant's criminal record was properly in evidence. See *State v. Massey*, *supra* (statutory method of proving prior convictions permissive rather than mandatory), *see also* 15A-1340.4(e). The judge properly found that this aggravating circumstance, in the absence of any factor in mitigation, warranted the imposition of a term that exceeded the presumptive. Except for maximum sentence limitations in G.S. 14-1.1, the severity of a sentence imposed pursuant to the Fair Sentencing Act, insofar as it is based on a weighing of aggravating and mitigating factors, is within the discretion of the judge. Here, there is no abuse of discretion.

Defendant's final argument is that the circumstances of the sentencing hearing show unfair prejudice and an abuse of discretion by the trial judge. This argument depends entirely on the specific points already brought forward. Accordingly, we find no

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merit to the argument and overrule defendant's assignments of error in this regard.

In the trial below, we find

No error.

Judges ARNOLD and WELLS concur.

FIREMAN'S FUND INSURANCE COMPANY v. JOHNNY WASHINGTON, SR., AS ANCILLARY ADMINISTRATOR OF THE ESTATE OF CEDRIC WASHINGTON, DECEASED; JOHNNY WASHINGTON, SR., INDIVIDUALLY; WYLEAN WASHINGTON, INDIVIDUALLY; JOHNNY WASHINGTON, JR., INDIVIDUALLY; SHANNON WASHINGTON AND TRACY WASHINGTON, MINORS, THROUGH THEIR GUARDIAN AD LITEM, JOHNNY WASHINGTON, SR.; JOHNNY WASHINGTON, SR., AS TRUSTEE FOR HIMSELF, WYLEAN WASHINGTON, JOHNNY WASHINGTON, JR., SHANNON WASHINGTON, TRACY WASHINGTON, AND THE ESTATE OF CEDRIC WASHINGTON; ANDERSON MOTOR LINES, INC.; INSURANCE COMPANY OF NORTH AMERICA; ROBERT J. O'LEARY; AND FLEMING'S EXPRESS, INC.

No. 8210SC857

(Filed 15 November 1983)

Constitutional Law § 24.7; Process § 9.1— personal jurisdiction over nonresident defendants—statutory basis—due process

In a declaratory judgment action to determine whether the insurer for a tractor-trailer owner or the insurer for its lessee had primary coverage for an accident involving the nonresident individual defendants, the courts of this state had jurisdiction over the nonresident defendants pursuant to G.S. 1-75.4(1)(d), and the assertion of personal jurisdiction over the nonresident defendants did not violate due process, where the accident occurred in this state; the nonresident defendants employed counsel in this state to investigate their rights and to take legal steps to enforce them; the head of defendants' family qualified in this state as ancillary administrator for the estate of his deceased son and as guardian ad litem for the injured minor children; and the nonresident defendants filed an action in this state to recover for their injuries and damages suffered in the accident and appointed a local attorney as their process agent.

APPEAL by defendant Washingtons from *Godwin, Judge*.
Order entered 20 April 1982 in Superior Court, WAKE County.
Heard in the Court of Appeals 7 June 1983.

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On July 16, 1978, six members of the Washington family, while on their way home to Florida, were severely injured in Wilson, North Carolina when their car was rear-ended by a tractor-trailer. The child, Cedric Washington, died from his injuries. The tractor-trailer, owned by Fleming's Express, Inc., a Pennsylvania corporation, and operated by their employee, Robert J. O'Leary, was under lease to Anderson Motor Lines, Inc., a Massachusetts corporation, whose liability insurer was Insurance Company of North America (INA). The tractor-trailer was covered by a liability insurance policy issued by Fireman's Fund Insurance Company to Fleming's; and in the lease agreement Fleming's agreed to indemnify Anderson against loss or damage resulting from the negligence, incompetence, or dishonesty of the driver, O'Leary.

Before this declaratory judgment action was brought in May, 1981 to determine which of the two insurance companies had primary coverage of the accident involved and thus the duty to defend the lawsuits filed because of it, three related suits had been filed and taken course as follows:

In March, 1979, in Broward County, Florida, the Washingtons sued Anderson, Anderson's insurer, INA, Fleming's, O'Leary, and Fleming's insurer, Fireman's Fund. The case was dismissed as to Fireman's Fund, Fleming's and O'Leary, pursuant to their motion, for lack of personal jurisdiction. On April 3, 1980, Anderson, stipulating liability, agreed to pay the Washingtons \$185,000 of the final verdict obtained by them and assigned to them all its rights under the lease agreement and Fireman's Fund's liability insurance policy; in exchange therefor the Washingtons released Anderson and INA from any further liability. On April 8, 1980, a non-jury hearing was held to adjudicate the Washingtons' rights as against Anderson and INA. No live testimony was presented and the evidence consisted of photographs, the medical bills, and affidavits from several Florida lawyers as to the value of each claim, and neither Anderson nor INA offered any evidence. The judge rendered verdict and judgment in favor of the Washingtons in the aggregate amount of \$1,838,867. According to Fireman's Fund, Fleming's and O'Leary, they did not learn of the settlement or trial until sometime after the judgment was rendered.

In May, 1980, in Broward County, Florida, the Washingtons sued Fireman's Fund for breach of their contract to defend and

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insure Anderson against liability because of the trip, lease, and accident involved. Fireman's Fund's answer denied that Anderson was covered under Fleming's policy and alleged that even if Anderson was covered, INA, the primary insurer, had the duty to defend Anderson in a non-negligent, good faith manner, and failed to do so. This case is still pending.

In July, 1980, in Wake County, North Carolina, the Washingtons sued Fleming's and O'Leary for negligently causing their injuries in the North Carolina accident; included in the suit was a second count against Fleming's based on their agreement to indemnify Anderson and Anderson's assignment of its rights to the Washingtons under the Florida judgment. The defendants joined Anderson and INA as third party defendants, alleging that the truck was under the exclusive direction and control of Anderson at the time of the accident, that INA's coverage was primary, and that it failed to properly represent Anderson, resulting in an excess verdict for the Washingtons. This case is still pending.

When this declaratory judgment action to resolve the coverage disputes between the two insurance companies and their insureds was brought, the other defendants were joined as parties because of their interest in the insurance issue. The Washington defendants, all of whom are Florida residents, moved to dismiss, alleging lack of jurisdiction over their persons. The trial judge denied the motion and the movants appealed.

Smith Moore Smith Schell & Hunter, by Stephen P. Millikan, Pamela DeAngelis, and Jeri L. Whitfield, for plaintiff appellee.

Bailey, Dixon, Wooten, McDonald & Fountain, by Gary S. Parsons, for defendant appellants, the Washingtons.

PHILLIPS, Judge.

Though the order appealed from is interlocutory, the matter is here properly, since G.S. 1-277(b) gives "the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant. . . ." In deciding the appeal, since the Washingtons reside in another state and the court is attempting to exercise *in personam* jurisdiction over them, we must first determine whether any North Carolina stat-

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ute authorizes the exercise of such jurisdiction over them under the circumstances involved; and, if so, whether haling them into court here violates due process of law under the Constitution of the United States. *Fiber Industries, Inc. v. Coronet Industries, Inc.*, 59 N.C. App. 677, 298 S.E. 2d 76 (1982). For a comprehensive discussion of the necessity for making these two determinations in cases like this, see *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

In this instance statutory authority adequate to the purpose certainly exists. G.S. 1-75.4(1)(d) states:

§ 1-75.4. Personal jurisdiction, grounds for generally.

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

- (1) Local Presence or Status.—In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:

. . . .

- d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

That this statute is far-reaching enough in this instance to embrace the Washingtons, who at this time are in our courts prosecuting a lawsuit, a very substantial activity, indeed, is self-evident. The statute has been interpreted to authorize jurisdiction to the fullest extent permitted under the due process clause of the United States Constitution. *Mabry v. Fuller-Shuwayyer Co.*, 50 N.C. App. 245, 273 S.E. 2d 509, *disc. rev. denied*, 302 N.C. 398, 279 S.E. 2d 352 (1981). Thus, only the due process determination remains.

In determining how far the statute can be applied *constitutionally*, we must look to the "minimum contacts" doctrine laid down by the Supreme Court of the United States. In *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945), it was ruled that in the absence of certain minimum

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contacts with the forum state that subjecting a non-resident defendant to *in personam* jurisdiction offended the due process concept of fair play and substantial justice. In *McGee v. International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957), where personal jurisdiction over a foreign insurance company was upheld on the basis of the single policy sued on, the Court in deciding the due process question apparently considered the plaintiff's status and activities—a forum state resident, who mailed the premiums from there—as well as those of the defendant. In a subsequent case, however, the Court made plain that the minimum contacts required are those brought about by the defendant non-resident, and that “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958). In applying these principles to this case, however, no rule of thumb exists to guide us. Thus, in the final analysis, whether the non-resident defendants have subjected themselves to the jurisdiction of our court depends not upon a formula of some kind, but upon what is fair and reasonable—and what is fair and reasonable, of course, depends upon the circumstances of their case. *Farmer v. Ferris*, 260 N.C. 619, 133 S.E. 2d 492 (1963). Under the circumstances recorded here we are of the opinion that certain of their activities in this state did subject the non-resident defendants to the jurisdiction of our courts and that exerting that jurisdiction is in keeping with due process of law concepts of fairness and reasonableness.

Though the contacts that the non-resident defendants have had with this state make a rather long list, some of them by themselves would have little or no effect on the determination of this appeal. That through no fault of their own, while traveling through our state, they had the misfortune to be injured or killed, thereby making it necessary to obtain medical and hospital care here, is no basis for subjecting them to *in personam* jurisdiction with respect to the coverage conditions of appellee's insurance policy, as the appellee contends. Basing personal jurisdiction in a case like this upon such involuntary and imposed activities as that would, we think, clearly violate due process. But the voluntary, purposeful steps that the Washingtons took following the

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tragic accident changed the picture. By employing counsel here to investigate their rights and to take legal steps to enforce them; by the family head qualifying in our court as ancillary administrator for the estate of his deceased son and as guardian ad litem for the injured minor children; by all of them filing suit for their injuries and damages in our court and appointing another local lawyer as their process agent; and by cooperating with their lawyer here ever since in preparing their case for trial, they have purposefully availed themselves of the benefits and protection of our laws and cannot validly object to being haled into court here in connection therewith.

In contending that their activities in this state were insufficient to subject them to the court's jurisdiction, the defendant appellants mainly rely on three cases in each of which it was held that the non-resident defendant had not subjected itself or himself to *in personam* jurisdiction in North Carolina by participating in certain litigation in this state. Neither of these cases, however, involved circumstances at all similar to those recorded here. In *Munchak Corporation v. Riko Enterprises, Inc.*, 368 F. Supp. 1366 (M.D.N.C. 1973), the lawsuit that the non-resident defendant participated in was over and it participated not as a plaintiff voluntarily seeking legal relief in this state, but as a behind the scenes supporter of a *defendant*, who was in court here against his will. In *Georgia Railroad Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E. 2d 637 (1980), a suit to enforce a loan guaranty made in South Carolina, the lawsuit that the Pennsylvania defendant participated in as a plaintiff was also over and it involved a tract of land owned by defendant, which property had no relation at all to plaintiff's suit. Finally, *Winder v. Penniman*, 181 N.C. 7, 105 S.E. 884 (1921) stands only for the ancient, universally recognized, but irrelevant proposition that a non-resident who is in the state for the sole purpose of testifying as a party or witness in a lawsuit cannot be served with process while here.

In contrast, the Washingtons' lawsuit here is still in progress and it relates directly to the subject matter of this case. If their suit is won collection cannot be accomplished until the coverage, defense and liability issues raised by the appellee in this case are resolved. Requiring those issues to be litigated here will not be unfair to the Washingtons, who could have anticipated as much

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when they sued appellee's insured here under all theories available to them.

Affirmed.

Judges HEDRICK and WELLS concur.

R. W. CANNON, CANNON HEATING & AIR CONDITIONING COMPANY, AND THE CITY OF WILMINGTON, NORTH CAROLINA, PETITIONERS v. THE ZONING BOARD OF ADJUSTMENT OF THE CITY OF WILMINGTON, NORTH CAROLINA, JAMES A. PRICE, JR., CHAIRMAN, ROBERT J. WILLINGHAM, III, RICHARD P. REAGAN, JACK W. SMITH, SR., RICHARD L. MCLEOD AND CLYDE G. MARTIN, RESPONDENTS, AND HAROLD E. LANGE, NANCY G. LANGE, W. R. CRABBIE, WILLIAM D. ESTABROOK, MARILYN ESTABROOK, ROBERT C. BURNETTE, FLORA BURNETTE, JOE HARDEN, CHERYL HARDEN, R. A. MCCLURE, JR., PAUL CHESTNUT, FRANK G. RUZZANO, ALICE K. RUZZANO, FRED STERNBERGER, CHRIS STERNBERGER, MRS. CARL BROWN, SR., CHARLES L. CHANCE, MARGUERITE L. CHANCE, JAMES F. BLOOMER, C. A. HUGHES, LAWRENCE L. MARTENEY, RUTH MARTENEY AND RICHARD E. UFFALUSSY, INTERVENOR-RESPONDENTS

No. 825SC1238

(Filed 15 November 1983)

1. Municipal Corporations § 31.2— revocation of building permit—appeal from decision—scope of review

In an appeal from the revocation of a building permit, examination of a superior court order revealed that the superior court did not exceed its powers where the judge expressly concluded, based on extensive examination of the whole record, that the decision of the zoning board was free of error in law, that appropriate procedures were followed, that the petitioners were afforded full due process rights, and that the decision of the board was supported by substantial evidence and was neither arbitrary nor oppressive.

2. Municipal Corporations § 30.15— enlargement of nonconforming use—sufficiency of evidence

Examination of the record revealed ample evidentiary support for a zoning board's findings and conclusion that construction of a building would constitute enlargement of a nonconforming use where evidence regarding the nature and extent of petitioner's asserted nonconforming use was controverted, and where the board, sitting as the trier of fact, was entitled to find and conclude that the proposed use of a building which petitioners wished to construct would expand the prior nonconforming use of his property.

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3. Municipal Corporations § 30.15— revocation of building permit—nonconforming use—relevancy of evidence

In an action in which petitioners appealed the revocation of a building permit, the board's consideration of evidence pertaining to a request for a variance to allow a stable and pertaining to the fact that petitioner's business had substantially increased did not constitute reversible error.

Judge BECTON concurring in the result.

APPEAL by Petitioners from *Tillery, Judge*. Judgment entered 5 May 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 20 October 1983.

Petitioners appeal the revocation of a building permit by the Wilmington Zoning Board of Adjustment. The Board based its decision to revoke the permit on its conclusion that the construction of the building in question would constitute an unlawful expansion of a nonconforming use. The evidence tends to show the following:

Mr. Cannon, one of the petitioners, purchased property outside the Wilmington city limits in 1952, at which time he established a business in a building on the property. Mr. Cannon used this property as well as adjacent property not owned by him to store materials and equipment related to his business. In 1964 the City annexed Mr. Cannon's property and the property adjacent to it, and the land was zoned as a "single family district." While Mr. Cannon's commercial use of his property would ordinarily be prohibited under this zoning classification, it qualifies as a prior nonconforming use and has not been challenged. In 1965 Mr. Cannon purchased the adjacent property; his continued use of this property for storage is uncontroverted, although the frequency and extent of his use has been hotly disputed. In 1981 Mr. Cannon obtained from the City Building Inspector a permit for construction of a storage building, 50 feet by 80 feet, to be placed in part on the property he acquired in 1965. Neighboring landowners appealed the Building Inspector's decision to issue the permit. Following a hearing on the matter by the City Board of Adjustment, the Board made findings of fact and conclusions of law and revoked the building permit. Petitioners sought and obtained review of the Board's decision by writ of certiorari in the Superior Court. From the judgment of the Superior Court affirming the decision of the Board of Adjustment, petitioners appealed.

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Laura E. Crumpler and Thomas C. Pollard for petitioner, appellant, City of Wilmington.

Burney, Burney, Barefoot & Bain, by Auley M. Crouch, III, and Hunter, Wharton & Howell, by John V. Hunter, III, for petitioners, appellants, R. W. Cannon and Cannon Heating and Air Conditioning, Inc.

Murchison, Taylor & Shell, by William R. Shell for respondents, appellees and intervenor-respondents, appellees.

HEDRICK, Judge.

[1] The Petitioners first contend that "the Superior Court exceeded its powers and was without jurisdiction to make findings of fact and conclusions of law based thereon." Petitioners' reference is to the findings of fact made by the Superior Court judge based on his review of the record.

The duty of the Superior Court in reviewing the decision of a town board sitting as a quasi-judicial body was succinctly enunciated by Justice Carlton in *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E. 2d 379, 383 (1980) as follows:

[T]he task of a court reviewing a decision on an application for a conditional use permit made by a town board sitting as a quasi-judicial body includes:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Examination of the order filed by the Superior Court in the instant case reveals a conscientious effort by the trial judge to

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fully comply with his responsibilities as set out in *Concrete Company*. The judge expressly concluded, based on an extensive examination of the whole record, that the decision of the Board was free of error in law, that appropriate procedures were followed, that the Petitioner was afforded full due process rights, and that the decision of the Board was supported by substantial evidence and was neither arbitrary nor oppressive. While it may have been unnecessary for the trial judge to make additional findings of fact, examination of the challenged findings reveals a recitation of largely uncontroverted evidence. In this we find no prejudicial error.

[2] Petitioners' second argument is that "the superior court erred in affirming the Board of Adjustment's conclusion that the building constitutes an enlargement of a nonconforming use." Expansion of nonconforming situations is governed by Wilmington City Zoning Ordinance Sec. 13(E), which in pertinent part provides:

(1) Except as specifically provided in this section, it shall be unlawful for any person to engage in any activity that causes an increase in the extent of nonconformity of a nonconforming situation.

. . .

(5) Physical alteration of structures or the placement of new structures on open land are unlawful if they result in:

(a) An increase in the total amount of space devoted to a nonconforming use; . . .

The question before this Court, as before the Superior Court, is whether the Board's conclusion is supported by findings of fact that are in turn supported by substantial evidence when the whole record is considered. Our examination of the record reveals ample evidentiary support for the Board's findings and conclusion that construction of this building would constitute enlargement of the nonconforming use. Mr. Cannon's own testimony was that his use of the area in question has been sporadic and varied. Furthermore, assuming *arguendo* that Cannon's use of property not owned by him would be protected as a nonconforming use if it otherwise qualified for such treatment, our examination of the

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record discloses little evidence that the extent of his use in 1964, at the time of annexation, was equivalent to or greater than that now encompassed by a 4000 square foot building. We further note evidence in the record tending to show that Mr. Cannon began to use the property in question for open-air "storage" in the early 1970s, and that his use of the area at that time included parking as well as "storage." In short, the evidence regarding the nature and extent of Mr. Cannon's asserted nonconforming use was controverted, and the Board, sitting as the trier of fact, was entitled to find and conclude that the proposed use would expand the prior nonconforming use. Because the Board's findings and conclusions are supported by substantial evidence in the record as a whole, we find no error in the action of the Superior Court.

[3] Petitioners next argue that "the controversy over the stable located on appellant Cannon's property is irrelevant; findings of fact pertaining to the stable and conclusions of law based thereon should be disregarded." Petitioners' reference is to the Board's consideration of evidence relating to the history of Mr. Cannon's use of the property he acquired in 1965. Specifically, the evidence tended to show, and the Board found as a fact, that Mr. Cannon had applied for a variance that would allow a stable located on the property to be used for commercial storage. The request for a variance was ultimately denied as an illegal expansion of a nonconforming use. We do not agree that the Board's consideration of this evidence constitutes reversible error. The evidence supporting the Board's findings in this regard was uncontroverted, and in our opinion clearly relevant to the question before the Board—the extent and nature of Petitioner's asserted nonconforming use of his property. In their brief, Petitioners fail to identify the conclusions of law allegedly based on these findings, and our review of the record indicates that the Board's conclusions are supported by evidence and findings independent of those challenged. We find no error in the actions of the Board and Superior Court in this regard.

Petitioners' final argument is that the Board erred in finding as a fact that Mr. Cannon's business had substantially increased since 1964. Once again Petitioners' challenge is not to the accuracy of the finding, but rather to its relevance to the issues before the Board. Examination of the Board's conclusions clearly reveals that the Board did not base its decision on the ground

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that Mr. Cannon's growth in business amounted to expansion of a nonconforming use. We do not believe that the spirit of zoning legislation would be served by requiring administrative boards to confine their consideration of evidence to that bearing a direct and immediate relationship to narrow legal questions or else risk reversal at the appellate level. Where, as here, the conclusions of the Board are supported by findings of fact based on substantial evidence, the presence of additional findings not necessary to the decision will not constitute reversible error.

The judgment of the Superior Court affirming the decision of the Board of Adjustment is

Affirmed.

Chief Judge VAUGHN concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Because I view this case as involving an *enlargement* or *expansion* of a nonconforming use, I concur. Fearful that our decision today may be read as prohibiting *intensification* of a nonconforming use, I quote the following passage from 1 R. Anderson, *American Law of Zoning* § 6.47 (2d ed. 1976):

§ 6.47. Volume, intensity, or frequency of use.

A nonconforming use of land, whether it is a dairy farm, a manufacturing plant, or a rooming house, is not likely to remain static. As the use is exploited and economic changes occur, it may grow in volume or intensity, and periods of active use may become more frequent or of longer duration. These changes in the level of use may have profound impact upon property in the areas where they are located, but the zoning regulations seldom include specific provisions for restricting this kind of growth. . . . Absent some element of identifiable change or extension, an increase (sometimes referred to as a 'mere' increase) in volume, intensity, or frequency of use is held not to be an extension of use proscribed by [zoning] ordinances. . . .

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The Wilmington City zoning ordinance, as codified in Wilmington, N. C., Code ch. 32 (1969), itself suggests that qualitative, as opposed to quantitative, changes are not prohibited. For example, ch. 32 § 13(E)(4) provides: "Where a nonconforming situation exists, the equipment or processes may be changed if these or similar changes amount only to *changes in degrees of activity*, rather than changes in kind. . . ." (Emphasis added.)

Finally, although in my view "the controversy over the stable located on appellant Cannon's property," ante p. 6, was irrelevant, I am still not convinced that the Board's consideration of this evidence constituted reversible error.

EDWARD G. MICHAEL, D/B/A MICHAEL'S GOLD FASHIONS v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY AND MCPHAIL, BRAY, MURPHY & ALLEN, INC.

No. 8226SC734

(Filed 15 November 1983)

Insurance § 141— retail jeweler's theft policy—failure to place jewelry in safe

Defendant insurer was liable under its policy insuring plaintiff's retail jewelry store against theft for only 2% of the value of jewelry lost by theft during a break-in at the store where the policy required plaintiff to maintain in the store a Class F safe or vault; plaintiff represented in his application for the policy that 98% of the insured jewelry would be locked in the safe when the store was closed; the policy contained a notice warning plaintiff that failure to comply with his representations in the application could void the policy; the theft occurred while the store was closed; and none of the jewelry was in the safe at the time of the theft.

APPEAL by plaintiff and cross-appeal by defendant Insurance Company from *Lewis, Robert D., Judge*. Judgments entered 26 February 1982 and 1 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 May 1983.

Plaintiff owns and operates a retail jewelry store. The defendant insurance company issued its policy insuring the plaintiff's business against theft. The defendant McPhail, Bray, Murphy & Allen, an insurance agency, obtained the policy at plaintiff's request. Plaintiff's claim against the defendant insurance company is to recover under the policy for jewelry in the

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approximate amount of \$19,000 that was stolen when his store was broken into. Plaintiff's claims against the defendant agency are based on allegations that the agency (1) negligently advised him that the theft policy did not require him to keep the insured jewelry in the safe when the store was closed, and (2) failed to obtain a theft policy for his business that contained no restrictions, as it contracted and agreed to do.

The evidence presented at trial tended to show that:

Plaintiff, who had theretofore operated other types of businesses, opened a retail jewelry store on December 10, 1979. Two days later he contacted the defendant agency about getting insurance for his business, and a binder was issued that day which provided temporary fire, general liability and vandalism coverages. But theft insurance was neither applied for nor obtained at that time, as plaintiff was advised, because the alarm system and safe that plaintiff had did not meet insurance industry requirements for jewelry stores. After discussing these requirements and the reason for them, plaintiff ordered a Class F safe recommended by the agent and contacted ADT about their warning system, but he did not have it installed because meanwhile the agency had ascertained that the defendant insurance company might waive that requirement if the Class F safe was obtained. On 7 February 1980, after the Class F safe was delivered, the agency had plaintiff to formally apply to the defendant insurance company for a theft policy, and discussed the different requirements of the application with plaintiff and the fact that the policy and its cost would be based on the information furnished therein. The agency maintains that it impressed on plaintiff the necessity of locking the jewelry in the safe when the store was closed if he was to have theft insurance. The application, called a "proposal" for a Jeweler's Block policy, contained many questions, including several about the safe and warning system. In a section entitled "WARRANTIES AS TO PROPERTY INSURED DURING TERM OF INSURANCE AT ALL TIMES WHEN PREMISES ARE CLOSED" was a question requiring plaintiff to state what percentage of his jewelry would be kept in a locked safe or vault when the premises were closed; plaintiff's answer was 100% and the following handwritten statement was added thereto: "All jewelry will be locked in safe at night."

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In response to the proposal, the defendant insurance company issued its Jeweler's Block policy to plaintiff a few weeks later. The policy contained a prominent, brightly-colored *notice* on its face sheet stating "THE ANSWERS TO THE QUESTIONS IN THE PROPOSAL ATTACHED TO THIS POLICY CONSTITUTE WARRANTIES. IF THEY ARE INCORRECT OR ARE NOT FOLLOWED YOUR INSURANCE CAN BE VOIDED." The body of the policy also contained a provision stating:

8. It is a condition of this insurance that:

. . . .

(B) The Insured will maintain during the life of this Policy, insofar as is within his or their control, watchmen and the *protective devices* as described in his or their proposal form or in endorsements attached hereto. (Emphasis added.)

In July of 1980, plaintiff moved his store to a new location and began displaying the jewelry in a manner that made it more inconvenient to put all of it in the safe each night. He notified the agency he was leaving about \$2,000 worth of charms in the case each night and asked defendant agency if these changes would affect his insurance. Because of the changes, a new "proposal," in form identical to the first, was done by plaintiff and the agency. In it plaintiff stated that 98% of his jewelry was locked in the safe when the store was closed. This proposal and plaintiff's answers thereto were accepted by the company and added to the policy, as before. According to plaintiff, he asked the agency when the new proposal was submitted how much of the jewelry, if any, he was required to put in the safe at night, and was told that the policy did not require any of it to be locked up, although the insurance company preferred all of it to be; but defendant agency claims it told plaintiff only \$2,000 worth of jewelry could be left out when the store was closed.

About three months later, plaintiff closed his store one night without putting any of the jewelry in his safe, because it was late and he was tired, and a thief broke in and stole articles worth about \$19,000. The defendant insurer denied plaintiff's claim because of his failure to lock the jewelry in the safe, and plaintiff sued both defendants. At the close of plaintiff's evidence, the trial

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court granted defendant insurer's motion for directed verdict with respect to 98% of the stolen jewelry, and granted plaintiff's motion for directed verdict with respect to 2% of the stolen jewelry and the property damage. The judge denied defendant agency's motion for directed verdict, but after considering the evidence, the jury found that plaintiff had not been damaged by the neglect of the defendant agency. Both plaintiff and defendant insurance company appealed.

Tucker, Hicks, Sentelle, Moon and Hodge, by John E. Hodge, Jr., for plaintiff appellant/appellee.

Young, Moore, Henderson & Alvis, by Dan J. McLamb and Barbara B. Weyher, for defendant appellant/appellee St. Paul Fire and Marine Insurance Company.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding, for defendant appellee McPhail, Bray, Murphy & Allen, Inc.

PHILLIPS, Judge.

Plaintiff and defendant insurance company both challenge the directed verdict by which the company was required to pay for the property damage and 2% of the jewelry lost in the theft—the plaintiff claiming by his appeal that all the stolen jewelry should be paid for, the defendant by its that none of it should be. In our opinion, the trial court's ruling was correct.

An insurance policy, of course, is but a special kind of contract, and in suing on the policy involved the plaintiff is bound by its terms no less than the insurance company. One term of the policy required plaintiff to maintain in the store during the policy period a Class F safe or vault, and another required him to lock 98% of the insured jewelry in the safe when the store was closed. Plaintiff's deliberate failure, for no excusable reason, to lock any jewelry at all in the safe the night of the theft was a breach of his contract obligation and bars his right to recover for the 98% of the jewelry that he promised would be safeguarded against thievery.

Though plaintiff's statement in applying for the insurance that he would lock the jewelry—all of it at first, 98% of it

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later—in the safe when the store was closed was dubbed a warranty by the policy, it was not a warranty, as plaintiff correctly points out. This is because G.S. 58-30 provides that statements in applications for insurance or in the policy itself “shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy.” But this does not eliminate plaintiff’s problems in the case as he contends, since the materiality of his promise or representation under the circumstances that existed is obvious, and his inexcusable failure to comply with it diminishes his rights under the contract accordingly.

A representation in an application for insurance that influences the insurance company to accept the risk and enter into the contract is a material representation. *Carroll v. Carolina Casualty Insurance Co.*, 227 N.C. 456, 42 S.E. 2d 607 (1947). Whether such representations are material depends upon the circumstances in each case and is usually, though not always, a question of fact for the jury. But in this instance we are of the opinion that the materiality of plaintiff’s promise to lock the jewelry in the safe when the store was closed is too plain for debate. It is universally known that a fortune in jewelry can be carried in one’s pocket, and loose jewelry protected only by a glass window or door and a glass showcase is a prime target for thieves, who can fill their pockets and be on their way long before the police or anybody else can respond to a burglar alarm; but opening and rifling a locked safe is neither that easy nor quick. Had the safe and its use been a matter of no consequence, it is inconceivable that the company would have required or plaintiff would have bought an expensive safe, which has no protective utility at all when empty and unlocked. Against this factual backdrop, in applying for theft insurance on his jewelry, plaintiff stated that the jewelry would be locked in a safe approved by the company when the store was closed; and in response thereto he received a policy stating in language that could neither be missed nor misunderstood that a failure to comply with his representation could void his coverage. In a different setting, a similar statement might well be regarded as immaterial and of no effect; but under the circumstances here, plaintiff chose not to abide by it at his peril, rather than the company’s. See 7 *Couch on Insurance* § 35:100 *et seq.* (2d ed. 1961).

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We are unaware of any previous North Carolina decision involving a Jeweler's Block policy and the failure of the insured to comply with the security and protective representations made in obtaining it. Such cases have been decided elsewhere, however, and our decision is in accord with them. *See Great American Insurance Co. v. Lang*, 416 S.W. 2d 541 (Tex. Civ. App. 1967); *Phoenix Insurance Co. v. Ross Jewelers, Inc.*, 362 F. 2d 985 (5th Cir. 1966). But, more importantly, we think, our decision is in accord not only with the parties' written contract, but with their demonstrated understanding of it, as well. The company would not insure plaintiff's jewelry against theft until plaintiff obtained a suitable safe and represented that the jewelry would be locked in it when the store was closed. Though plaintiff now contends that he did not understand the policy to require him to use the safe, his earlier actions indicate otherwise. He was unable to obtain theft insurance for his jewelry at first, and in order to obtain it, he bought the Class F safe required by the insurance company, at some expense certainly, and promised to use it when the store was closed; and, thereafter, when it became troublesome to lock up all of the jewelry each night, he took steps which led to the policy being amended to accommodate that change. These actions indicate as much as the words put in the contract that safeguarding the insured jewelry when the store was closed was material to the contract and was so understood by both parties.

But plaintiff's promise to lock 98% of the jewelry in the safe was not material to the policy coverages for property damage and the other 2% of the jewelry. Thus, the directed verdict in plaintiff's favor as to those losses, but no more, was proper.

As to his negligence claim against defendant McPhail, Bray, plaintiff contends the trial court made several prejudicial errors in charging the jury. We disagree. Our reading of the charge as a whole leaves us with the impression that the trial court carefully and correctly instructed the jury on all elements of the claim, and that a discussion of the several instructions complained of would not be beneficial. Among other things, the jury was specifically instructed that the defendant broker had a legal duty to explain plaintiff's policy to him, "including those conditions the violations of which would result in the policy being voided," and to not misstate the conditions or coverage of the policy. But even if some parts of the charge had been technically incorrect, it is

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unlikely that plaintiff would have been prejudiced thereby. This is because the dispute between plaintiff and McPhail, Bray was almost entirely factual. That defendant broker had a legal duty to correctly advise plaintiff insurance purchaser about the coverages obtained really was not contested; what was contested and what the outcome of the case depended upon was the advice that the broker gave. Plaintiff testified that the broker told him that locking the jewelry in the safe at night was not necessary, just preferred; defendant broker's testimony was directly to the contrary. In arriving at their verdict the jury did not accept plaintiff's version of that crucial occurrence and we have no reason to believe they would have done so if the judge had instructed them in the form and manner the plaintiff preferred or requested.

No error.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. BISHOP MOORE

No. 8329SC77

(Filed 15 November 1983)

1. Constitutional Law § 40—right to counsel—police visits to jail cell without prior notice to defendant's attorney—no showing of prejudice

Defendant failed to show any prejudice resulting to him as the result of at least one visit by a police officer to defendant's jail cell without prior notice to defendant's attorney in that defendant apparently made no incriminating statements until a later date when he made one voluntary statement without prompting by an officer and another incriminating statement in the presence of his attorney.

2. Criminal Law § 75—confessions—voluntariness

A written, signed statement by defendant was admissible into evidence where it was taken only after police read defendant his *Miranda* rights and defendant's attorney had arrived and where there was no evidence that police threatened defendant or promised him rewards for confessing.

3. Constitutional Law § 30—failure to disclose statement to defendant's attorney—nonprejudicial

Any failure of the State to comply with its duty to disclose a short voluntary statement of defendant was nonprejudicial since the State did properly

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disclose the existence of defendant's second, longer statement in which he also confessed to the crime charged.

4. Criminal Law § 91.1— denial of continuance—failure to publish trial calendar on time—waiver by defendant

By waiting until the second day of trial to move for a continuance, defendant waived his objection to a tardy publication of the trial calendar. G.S. 7A-49.3.

5. Indictment and Warrant § 9.8— armed robbery—failure to state in indictment name of person or business from which property taken—indictment fatally defective

An indictment charging defendant with armed robbery was fatally defective where it failed to state the name of the person or business from which the property was taken. G.S. 14-87(a).

Judge EAGLES concurs in the result.

APPEAL by defendant from *Owens, Judge*. Judgment entered 11 June 1982 in MCDOWELL County Superior Court. Heard in the Court of Appeals 29 September 1983.

Defendant Bishop Moore was indicted for assault with a deadly weapon and armed robbery, stemming from the robbery and beating of Josephine Blanton on 30 November 1981. Following a three day jury trial, defendant was found guilty of both charges and sentenced to a total of 26 years in prison.

Evidence for the state tended to show that, on the day of the robbery, defendant stood watch outside the business where the victim worked. A second man entered and actually carried out the robbery and another man and a woman waited nearby in a getaway car. At trial, the victim testified that she was alone in the business at the time of the robbery, that her assailant was wearing a ski mask and that she was unable to identify who robbed her. Defendant presented no testimony on his own behalf. From the verdicts of guilty and entry of judgment on the verdicts, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Robert H. Bennink, Jr. and Special Deputy Attorney General Jo Anne Sanford, for the State.

Joe K. Byrd, Jr., for defendant.

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WELLS, Judge.

Defendant presents numerous assignments of error, several of which relate to the use of defendant's confession at trial. Defendant contends that the trial court erred in denying his motion to suppress incriminating statements made by defendant to Officers Smith and Swafford of the Marion Police Department on 18 February 1982. Defendant asserts that (1) the state infringed on his right to counsel by visiting defendant without advising defendant's counsel, (2) that the incriminating statements were not voluntarily made, (3) that defendant did not waive his right to counsel or his right to remain silent before making the incriminating statements and (4) that statements of defendant were not disclosed to defendant's counsel despite a discovery request.

Upon defendant's motion to suppress the statements, the trial court conducted a lengthy *voir dire* hearing. The court found in summary, the following facts:

On 18 February 1982, defendant was an inmate in the McDowell County Jail, where he had been since December, 1981 when he was arrested and charged with the assault and armed robbery of Ms. Blanton. On the afternoon of 18 February 1982, defendant called Marion Police Officer Smith on the telephone and asked Officer Smith to come to the jail. On the way, Officer Smith went by the Police Department and asked Officer Swafford to accompany him. The two officers arrived at the jail about 6:45 p.m., and were taken to see defendant. Shortly after defendant saw the officers, and before any questions were asked, defendant stated that "I did the Josephine Blanton robbery." Officer Smith then told defendant not to say anything else, and suggested defendant call his court appointed attorney, Donald Coats. The officers then took defendant to the Police Department and at 8:10 p.m., defendant was advised of his *Miranda* rights. Defendant telephoned Coats, who arrived soon afterwards and tape recorded the ensuing interrogation of defendant. Defendant's statement was later reduced to writing by police. At the time the statements were made, defendant appeared nervous and his eyes were swollen, as if he had been crying, but defendant expressed himself well and was coherent. Defendant did not appear to be under the influence of drugs or alcohol, and was neither threatened nor promised any rewards for confessing.

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Although defendant's attorney was present during the entire time of the interrogation at the Police Department, defendant's attorneys first became aware of the earlier oral statement, "I did the Josephine Blanton robbery" during the *voir dire* examination of Officer Smith on 2 June 1982.

Based on the findings of fact, the court made the following conclusions of law:

1. Defendant's oral statement, "I did the Josephine Blanton robbery," was made freely and voluntarily.

2. The longer statement which was later reduced to writing was freely and voluntarily made after defendant had been advised of his *Miranda* rights and after his attorney had arrived.

After making these findings of fact and conclusions of law, the trial court denied the motion to suppress all statements made by defendant on 18 February 1982.

Our careful examination of the trial transcript shows that the trial court's findings of fact are supported by the evidence presented on *voir dire*. This leaves only the question whether the trial court's findings of fact support its conclusions and rulings on defendant's motion to suppress. See e.g., *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 96 S.Ct. 3215, 49 L.Ed. 2d 1213 (1976).

[1] We address first defendant's contention that his constitutional right to counsel was violated by police visits to his jail cell without prior notice to defendant's attorney. Evidence of these visits in the record and briefs is hazy at best, but it appears that Officer Smith visited defendant at least one time before 18 February 1982, and that Officer Smith gave defendant some cigarettes. While we frown on such visits, defendant has failed to show any prejudice resulting to him as a result of the meeting, since he apparently made no incriminating statements until 18 February 1982. In the absence of any other showing of prejudice, defendant's assignment of error is overruled.

[2] Defendant next argues that the statements should have been suppressed because the statements were not voluntarily made. We disagree. The second, longer statement was taken only after police read defendant his *Miranda* rights and defendant's attorney had arrived. There was no evidence that police threatened de-

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fendant or promised him rewards for confessing. See *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982), and *State v. Whitt*, 299 N.C. 393, 261 S.E. 2d 914 (1980). Because the second statement was admissible, we need not reach the issue of admissibility of the first, short statement made spontaneously by defendant soon after Officer Smith arrived at his cell. The second, longer statement clearly implicated defendant and admission of the first statement therefore cannot have been prejudicial to defendant. For the same reasons we also overrule defendant's contention that the statement should have been suppressed because defendant made no waiver of the right to counsel and the right to remain silent.

[3] Next, we address defendant's argument that the confession should have been suppressed because the state failed to disclose the contents of the confession before trial. The record shows that Donald Coats, defendant's first court appointed attorney, filed a discovery motion on 5 January 1982. The state responded on 24 March 1982, indicating that it intended to use the second statement against defendant at trial. The state did not disclose the first, short statement, "I did the Josephine Blanton robbery." The record also indicates that after attorney Joe Byrd replaced Coats as counsel for defendant on 30 March 1982, no further requests for discovery were filed until after the trial began. We hold, therefore, that the state complied with its duty as to discovery of the second, longer statement. The burden is on a defendant to seek discovery, *State v. Lang*, 46 N.C. App. 138, 264 S.E. 2d 821, *rev'd on other grounds*, 301 N.C. 508, 272 S.E. 2d 123 (1980), and a defendant waives his right to discovery by failing to request documents. *State v. Anderson*, 303 N.C. 185, 278 S.E. 2d 238 (1981). Defendant's counsel may not seek suppression of defendant's incriminating statements on the grounds that the state failed to disclose the statements, where trial counsel failed to request discovery. The record indicates that the state did not disclose defendant's first, short statement to either Mr. Coats or to Mr. Byrd. The trial judge made no finding of fact concerning when the state first became aware of the existence of the statement, but we need not decide that question to resolve the issue before us. The state clearly has a continuing duty to respond to proper discovery requests and must update its disclosures when it learns of additional evidence covered by the initial discovery

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request. However, any failure of the state to comply with its duty to disclose the first statement was nonprejudicial to defendant, since the state did properly disclose the existence of defendant's second, longer statement.

[4] Defendant next argues that the trial court erred in denying his motion to continue because the district attorney failed to publish a trial calendar in accordance with G.S. § 7A-49.3. Under the statute, the calendar must be filed at least a week before the beginning of a superior court session for criminal cases. In the case before us, the district attorney filed the calendar approximately five and one-half days before the court session began. By waiting until the second day of trial to move for continuance, however, defendant waived his objection to the tardy publication of the calendar. Defendant's assignment of error is overruled.

[5] Finally, we address defendant's argument that the trial court erred in denying his motion to dismiss because of fatal defects in the indictment charging him with armed robbery. The indictment, returned on 11 January 1982, fails to state the name of the person or business from which the property was taken. As a result, it fails to meet the requirements of G.S. § 14-87(a), which lists the elements of armed robbery as follows: (1) the unlawful taking or attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.

The indictment in this case was as follows:

The State of North Carolina

v.

Bishop Moore

Defendant

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 30th day of November, 1981, in McDowell County Bishop Moore unlawfully, wilfully, and feloniously having in his possession and with the use and threatened use of firearms, and other dangerous weapons, implements, and means, to wit: a hammer and knife whereby the life of Josephine Blanton

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was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away United States Currency of the value of less than four hundred dollars, from the presence, person, place of business, and residence of ____

While the state correctly notes that a number of cases hold that an indictment for armed robbery need not allege actual legal ownership of property, *see e.g., State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968), and *State v. Fate*, 38 N.C. App. 68, 247 S.E. 2d 310 (1978), the indictment must at least name a person who was in charge or in the presence of the property at the time of the robbery, if not the actual, legal owner. In the case at bar, the indictment states neither the legal owner of the property, the person who had control or custody of it at the time of the robbery, nor the place from which the property was stolen. Such an indictment is fatally defective as it is not sufficiently detailed to bar a later prosecution for the same offense. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). Defendant's motion should have been allowed.

We have examined the rest of defendant's assignments of error carefully and conclude that they are without merit and are overruled.

The result is:

In 81CRS6789, the judgment and sentence is

Vacated.

In 81CRS6786,

No error.

Judge ARNOLD concurs.

Judge EAGLES concurs in the result.

Johnston County v. McCormick

JOHNSTON COUNTY v. PEGGY K. McCORMICK, DOUGLAS H. McCORMICK
AND FARM BUREAU INSURANCE COMPANY

No. 8211SC1204

(Filed 15 November 1983)

1. Social Security and Public Welfare § 2— assignment of insurance rights to Medicaid provider—effect of statute

The statute providing that the acceptance of Medicaid assistance constitutes an assignment to the State of the recipient's "right to third party insurance benefits to which he may be entitled," G.S. 108-61.4, does not apply to a tort-feasor's liability insurance policy but applies only to the recipient's own insurance coverage.

2. Social Security and Public Welfare § 2— subrogation rights of Medicaid provider—liability insurance carrier's payment to recipient—carrier's absence of notice of subrogation right

An automobile liability insurance carrier who paid, on behalf of its tort-feasor insured, a claim to which a Medicaid provider has become subrogated under G.S. 108-61.2 may not be held liable to the Medicaid provider for the sum paid in the absence of actual or constructive notice by the insurance carrier of the Medicaid provider's subrogated right of recovery against its insured.

APPEAL by plaintiff from *Battle, Judge*. Judgment entered 3 August 1982 in JOHNSTON County Superior Court. Heard in the Court of Appeals 17 October 1983.

Plaintiff Johnston County brought suit in June, 1981 against Douglas McCormick, a seventeen-year-old Medicaid recipient; his mother, Peggy McCormick; and Farm Bureau Insurance Company, which had paid nearly \$30,000.00 to McCormick in settlement of his personal injury claim against one of Farm Bureau's policyholders.

The events giving rise to the county's suit began in February, 1978, when Douglas McCormick was injured while a passenger in a car driven by Farm Bureau's insured, Timothy Grimes. McCormick sued Grimes and the settlement which led to Farm Bureau's payment to McCormick was reached in late 1980. Meanwhile, in September 1978, Mrs. McCormick applied for Medicaid to assist in paying her son's medical bills. Medicaid, as administered by plaintiff, eventually paid out \$13,366.25 in benefits on McCormick's behalf. When plaintiff learned that McCormick

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had settled his personal injury claim it sought reimbursement of the Medicaid payments from defendants jointly and severally.

Defendant Farm Bureau answered and asserted as an affirmative defense that it had settled McCormick's claim against its insured without notice of plaintiff's subrogation rights.

After the pleadings were joined, plaintiff moved for summary judgment. In support of its motion, plaintiff submitted interrogatories served by plaintiff on Farm Bureau and the affidavit of Donald J. Best, Chief of the Third Party Recovery Section of the North Carolina Department of Human Resources.

Plaintiff's motion for summary judgment was followed by Farm Bureau's motion for summary judgment. Farm Bureau's motion was supported by the affidavit of Raymond Boykin, its Senior Field Claimsman, who was responsible for the investigation, negotiation, and settlement of McCormick's claim against its insured.

From the trial court's grant of summary judgment against it, plaintiff appeals.

W. A. Holland, Jr. for plaintiff.

Mast, Tew, Armstrong & Morris, P.A., by L. Lamar Armstrong, Jr., and George B. Mast, for defendant.

WELLS, Judge.

The threshold issue we must decide in this case is whether plaintiff's appeal is premature. Since summary judgment was allowed for fewer than all defendants and the trial court's judgment did not contain a certification pursuant to G.S. § 1A-1, Rule 54(b) of the Rules of Civil Procedure that there was "no just reason for delay," plaintiff's appeal is premature unless the summary judgment for defendant Farm Bureau affected a substantial right under G.S. § 1-277(a) and G.S. § 7A-27(d)(1). For reasons which will be stated in this opinion, we hold that a substantial right of plaintiff was affected and that the appeal is not premature.

We begin our decision on the merits by calling attention to two statutory provisions dealing with the rights of agencies of state government to recover sums paid for medical care on behalf of Medicaid recipients. The pertinent statutes in force to be con-

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strued under the facts in this case were G.S. §§ 108-59, 108-60, 108-61.2, and 108-61.4.¹ The statutes have been recodified as G.S. §§ 108A-54, 108A-55, 108A-57, and 108A-59 respectively.

G.S. § 108-59 provided for the creation of a Medicaid fund and G.S. § 108-60 provided for methods of payment from the fund. G.S. §§ 108-61.2 and 108-61.4 are directly at issue in this case, and we will therefore set them out, in pertinent part, verbatim.

§ 108-61.2. *Subrogation rights; withholding of information a misdemeanor.* —

(a) To the extent of payments under this Part, the county involved shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of assistance under this Part against any person. It shall be the responsibility of the county commissioners, with such cooperation as they shall require from the county board of social services and the county director of social services, to enforce this section through the services of the county attorney in accordance with attorneys' fee arrangements approved by the Department of Human Resources. The United States and the State of North Carolina shall be entitled to share in each net recovery under this section. Their shares shall be promptly paid under this section and their proportionate parts of such sums shall be determined in accordance with the matching formulas in use during the period for which assistance was paid to the recipient.

(b) It shall be a misdemeanor for any person seeking or having obtained assistance under this Part for himself or another to willfully fail to disclose to the county department of social services or its attorney the identity of any person or organization against whom the recipient of assistance has a right of recovery, contractual or otherwise.

1. We note that while G.S. § 44-49 creates a lien in favor of any person, corporation or governmental body which has provided medical care, upon personal injury damages recovered in civil actions by patients who have received medical treatment, there is no provision for creation of a lien where the patient settles with the wrongdoer, instead of filing a civil action. Thus, G.S. § 44-49 is inapplicable to the case before us since the record does not indicate that McCormick at any time filed an action against Grimes.

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§ 108-61.4. *Acceptance of medical assistance constitutes assignment to the State of right to third party insurance benefits; recovery procedure.* —

(a) By accepting medical assistance, the recipient shall be deemed to have made an assignment to the State of the right to third party insurance benefits to which he may be entitled.

(b) The responsible State agency shall disseminate the contents of this bill to all involved parties; the county government agencies, all Medicaid eligibles, all providers, and all insurance companies doing business in North Carolina.

. . .

Although in its complaint, plaintiff alleged “[t]hat pursuant to G.S. § 108-61.2, the State of North Carolina is subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of assistance and brings this action pursuant to G.S. § 108-61.2 against Peggy K. McCormick and Douglas H. McCormick,” it is clear from plaintiff’s complaint, motion for summary judgment, briefs and oral arguments, that plaintiff based its action against Farm Bureau on the provisions of G.S. § 108-61.4. Plaintiff’s central argument is that G.S. § 108-61.4 gave plaintiff a statutory lien against McCormick’s rights to payment from Grimes through his insurance carrier, Farm Bureau. We do not reach the question of whether G.S. § 108-61.4 creates a statutory lien because we hold that G.S. § 108-61.4 is not applicable to the facts in this case.

[1] In insurance law, the term “benefits” describes the contract coverage as the obligation of the insurer to the insured in the event of a loss by or injury covered by the policy. *See e.g.*, G.S. §§ 58-251.1(b)(4), (5); -251.5(a); -251.6(a); -254.1; -254.2; -254.4(e), (f); -262.14(1)(a), (6); and particularly -262.16 which establishes benefit standards for Medicaid supplement insurance; and G.S. § 58-367(1). It is clear therefore from the language of the statute that G.S. § 108-61.4 was intended as the vehicle through which the state might obtain an assignment of a benefit recipient’s rights to collect the same benefits (i.e., medical expenses) from the recipient’s *own* insurance coverage. It does not apply to a tort-feasor’s liability insurance policy.

[2] The question, so narrowed, which is dispositive of this appeal, is whether a liability insurance carrier who pays, on behalf of its insured, a claim to which a Medicaid provider has become

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subrogated under G.S. § 108-61.2 may be held liable to the Medicaid provider.

The general rule in insurance subrogation cases, which are clearly analogous to the circumstances under review in this case, is that payment by a tort-feasor of an injured party's claim without notice of a subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. *See* Annot. 92 A.L.R. 2d 102, § 5 (1963 & 1983 Supp.). *See also Insurance Co. v. Bottling Co.*, 268 N.C. 503, 151 S.E. 2d 14 (1966), where the court stated the general rule, but held that where the evidence showed that the tort-feasor settled with knowledge of the subrogee's interest, such settlement was not a defense to the subrogee's claim. *See also Insurance Co. v. Spivey*, 259 N.C. 732, 131 S.E. 2d 338 (1963).

Applying these principles of the law of subrogation to the case at bar, we are persuaded that if Farm Bureau settled with McCormick without notice, actual or constructive, of plaintiff's subrogated right of recovery against Grimes, then plaintiff cannot recover either against Grimes or Farm Bureau the sums it paid on McCormick's behalf. We hold that the forecast of evidence before the trial court clearly shows lack of such notice and that, therefore, summary judgment was properly entered for Farm Bureau.

In its complaint, plaintiff alleged that it had paid the following sums on McCormick's behalf:

<u>PROVIDER</u>	<u>AMOUNT MEDICAID PAID</u>
Johnston Memorial Hospital	\$ 1,341.40
Charlotte Memorial Hospital	1,873.85
Charlotte Rehabilitation Hospital	3,705.45
Charlotte Memorial Hospital	348.27
Rehabilitation Associates	38.52
Charlotte Rehabilitation Hospital	5,707.36
Dr. Manuel Versola	57.96
Medical Transport Service	48.00
Dr. Edwin Martinat	80.33
Forsyth Memorial Hospital	55.45
Carroll Pharmacy; Revco Drugs; Johnson's Drug Co.; Pruett Drug Co.; Powell's Pharmacy; and Mann's of Asheboro, N.C.	109.66

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In response to plaintiff's interrogatories, Farm Bureau listed three bills for medical services in its possession when it settled with McCormick:

Wake Radiology Consultants, P.A.	\$ 133.00
Cape Fear Valley Hospital	21,103.38
Raleigh Neurosurgical Clinic	760.00

All of these bills were attached to Farm Bureau's response. None of them bear any indication on their face that any of the charges had been paid by anyone or that there were any sources available to the provider of the services for payment of the bills except the patient. None of them shows any Medicaid information of any kind. In his affidavit in support of Farm Bureau's motion, Raymond Boykin stated the following:

I am the Senior Field Claimsman for North Carolina Farm Bureau Mutual Insurance Company.

I am familiar with the case of Johnston County vs. Peggy K. McCormick, Douglas H. McCormick and Farm Bureau Insurance Company. I was responsible for investigation, negotiations and settlement of the original claim made on behalf of Douglas H. McCormick. His claim was for personal injuries sustained in an automobile accident. I have completely reviewed North Carolina Farm Bureau Mutual Insurance Company's file regarding this matter and I find no notice or information in the file, or otherwise, that the injured party (Douglas H. McCormick) was receiving assistance through the Department of Human Resources. I find no letter, or other documentation in the file which ever put North Carolina Farm Bureau Mutual Insurance Company on notice prior to its disbursement of the monies paid in full settlement of the claim, that Johnston County was claiming a lien pursuant to G.S. 108-61.4. In addition, I do not remember ever discussing the fact that Douglas H. McCormick had received medical assistance payments with anyone prior to the settlement of this claim. We received all of the medical bills regarding Douglas H. McCormick injuries through attorney Wiley Bowen. The bills do not indicate Douglas H. McCormick had received medical assistance payments. Mr. Bowen did not indicate that Douglas H. McCormick had received medical assistance payments.

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Farm Bureau's forecast of evidence clearly shows that it was without notice, actual or constructive, of plaintiff's payments on behalf of McCormick. Plaintiff made no response to Farm Bureau's forecast of evidence, but relied solely on the allegations in its complaint. Under such circumstances, Farm Bureau was entitled to summary judgment. *See Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982).

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

LEONA A. ROPER, EMPLOYEE v. J. P. STEVENS & CO., EMPLOYER, AND LIBERTY MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. 8210IC1214

(Filed 15 November 1983)

Master and Servant § 69— compensability of complications from original injuries—not properly considered

The Commission's award was not proper where it did not take into account all the complications arising from plaintiff's accidental injury in that plaintiff's award should have included compensation for the complications of phlebitis, arthritis and severe body pain which resulted from her injury. G.S. 97-2(6), G.S. 97-31, G.S. 97-29, and G.S. 97-30.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 9 August 1982. Heard in the Court of Appeals 18 October 1983.

In this action, plaintiff seeks an award of worker's compensation for permanent and total disability, among other things, for injury arising by accident and its resultant complications. On 30 December 1977, plaintiff fell off a platform while working for defendant and broke her right hip and upper leg. As a result of this injury, plaintiff developed phlebitis and arthritis in both legs and suffered severe whole body pain. The Industrial Commission granted plaintiff an award for temporary total disability, permanent partial disability as to her right leg, medical expenses, and attorney's fees, but denied compensation for permanent and total disability. From this opinion and award, plaintiff appealed.

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Stephen T. Daniel, for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner and Kincheloe by Edward L. Eatman, Jr., and John H. Gardner, for defendant appellees.

HILL, Judge.

After the evidentiary hearings, Commissioner Coy M. Vance filed an opinion and award which included the following findings of fact, in relevant part:

1. Plaintiff is a 60 year old female who had worked for defendant employer 22 years prior to December 30, 1977, the date of the injury by accident arising out of and in the course of her employment. . . .

2. On December 30, 1977, plaintiff fell from a platform she worked on and broke her hip and right leg in three places. She was admitted to Grace Hospital in Morganton, North Carolina. Pins were placed in the hip and right leg, and the right leg was shorter than the left leg after the operation.

3. As a result of the injury, plaintiff was paid temporary total disability at the rate of \$104.00 per week from December 30, 1977 to April 5, 1979 for 66 weeks. . . .

4. The pain from (plaintiff's) right hip radiates up into her back. She cannot sit or stand in one position for more than 15 to 20 minutes at a time. Her job required her to stand on a platform. She must use a cane to walk and cannot sleep at night because of pain in both legs.

5. As a result of plaintiff's injury on December 30, 1977, she has developed phlebitis and post traumatic arthritis in both legs.

6. Plaintiff was readmitted to the hospital for phlebitis, inflammation and irritation of blood vessels of the involved area on August 21, 1979. . . . Plaintiff never had any problem with phlebitis prior to the injury by accident. . . .

7. Plaintiff's temporary total disability payments were discontinued on April 5, 1979 without cause or filing a Form

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24 with the Commission, and shall be reinstated at the rate of \$104.00 per week beginning on April 6, 1979 and continuing through October 4, 1979, plus a ten per cent penalty for late payment of the entire amount.

8. As a result of plaintiff's injury by accident, she sustained 21 per cent permanent partial disability to the right hip.

9. Plaintiff has been hospitalized on occasions since the date of the first hearing on October 4, 1979. Temporary total disability payments are due for these periods of time. The permanent partial disability payments shall be discontinued during the periods that plaintiff was temporarily, totally disabled.

10. On July 3, 1980, plaintiff was essentially totally incapacitated due to the pain in the left leg and became temporarily totally disabled on that date. Therefore, she is entitled to temporary total disability payments beginning on July 3, 1980. The permanent partial disability payment due for the right hip shall be discontinued as long as she is temporarily, totally disabled.

11. Plaintiff's treating physician, Dr. James Melton, states the prognosis for any improvement in the future is very poor. She will never have a functional right hip. Her exercise activity left will be restricted. She can never stay in one position for more than minutes or fractions of an hour at a time without severe discomfort. She will never be able to have gainful employment to any realistic degree.

Based on these findings, Commissioner Vance made conclusions of law which included the following:

3. Plaintiff suffered a change of condition and became temporarily, totally disabled for periods of time after October 4, 1979 when entering the hospital and she became permanently and totally disabled on July 3, 1980, and is entitled to temporary total disability compensation payments during this period.

Commissioner Vance then awarded compensation to plaintiff as follows:

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1. Defendants shall pay and plaintiff shall accept compensation for temporary total disability from April 6, 1979 to October 4, 1979, at the rate of \$104.00 per week, for 26 weeks. In addition, defendants shall pay a penalty of \$2,984.40. . . .

2. Defendants shall pay plaintiff permanent partial disability payments beginning on October 5, 1979 and continuing for 42 weeks for 21 per cent permanent partial disability to the right leg. . . .

3. Plaintiff suffered a change of condition during periods of time when she was hospitalized between October 4, 1979 and July 3, 1980, and defendants shall pay plaintiff temporary total disability for these periods. Permanent partial disability payments shall be discontinued during the time that temporary total disability payments are due. . . .

4. Defendants shall pay plaintiff compensation at the rate of \$104.00 per week beginning July 3, 1980 for permanent and total disability and continuing until plaintiff has a change of condition. Payment for permanent and total disability to the right leg shall be discontinued on July 2, 1980. . . .

5. Defendants shall pay all medical expenses incurred by plaintiff as a result of the injury by accident. . . . This payment shall include the treatment for phlebitis to both legs.

6. An attorney fee in the amount of \$2,500.00 is hereby approved and allowed for plaintiff's counsel.

From the opinion and award of Commissioner Vance, defendants appealed to the Full Industrial Commission. On 9 August 1982, the Full Commission filed an opinion and award in which it found:

[T]hat certain findings and conclusions of Commissioner Vance are not supported by applicable law and that the Opinion and Award must be amended. It appears that plaintiff's disabilities are to her lower extremities and possibly the back which are specific disabilities covered by G.S. 97-31. . . . THEREFORE the Full Commission strikes out findings of fact #9, #10, and #11; Conclusion of Law #3; and Paragraphs #3 and #4 of the Award.

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The Commission affirmed and adopted the remainder of the opinion and award.

Plaintiff contends the Commission erred in failing to adopt Commissioner Vance's opinion and award in its entirety thereby denying her compensation for permanent and total disability under G.S. 97-29. She argues the Commission failed to take into consideration the abundance of uncontradicted evidence that she is permanently and totally disabled and that this disability was the result of not only the initial impairment to her right leg but also unscheduled impairments to her whole body. We agree.

Our review of this matter "is limited to the questions of law (1) whether there was competent evidence before the Commission to support its findings of fact and (2) whether such findings justify the legal conclusions and decision of the Commission." *Smith v. American & Efird Mills*, 51 N.C. App. 480, 486, 277 S.E. 2d 83, 87 (1981), *modified and aff'd*, 305 N.C. 507, 290 S.E. 2d 634 (1982). In considering the matters raised herein, we must construe the Workmen's Compensation Act liberally so as to effectuate its human purpose of providing compensation for injured employees. *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 588, 281 S.E. 2d 463, 466 (1981). The benefits of the Act should not be denied by a technical, narrow, and strict construction. *Id.*

The first issue presented by this appeal is whether plaintiff is entitled to compensation for the complications of phlebitis, arthritis and severe body pain which resulted from her injury on 30 December 1977. It is not disputed, and indeed the Commission found as a fact that the complications of phlebitis and arthritis were the result of plaintiff's compensable injury. A compensable injury is defined by G.S. 97-2(6) as being "only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident."

Similarly, this Court has defined the scope of a compensable injury as follows: "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct." *Starr v. Paper Co.*, 8 N.C. App. 604, 611, 175 S.E. 2d 342, 347, *cert. denied*, 277

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N.C. 112 (1970) (quoting from Larson's Workmen's Compensation Law, Section 13.00). Whether plaintiff's complications are considered subsequent injuries or diseases, they are compensable under the Act as they were the natural and unavoidable result of the primary injury to plaintiff's hip and upper leg.

Further indicating that the complications are compensable is the following from 1 A. Larson, *The Law of Workmen's Compensation*, Section 13.11, p. 3-348, 349, 351 (1982):

[A]ll the medical consequence and sequelae that flow from the primary injury are compensable. The cases illustrating this rule fall into two groups.

The first group about which there is no legal controversy, comprises the cases in which an initial medical condition itself progresses into complications more serious than the original injury; the added complications are of course compensable. Thus, if an injury results in a phlebitis, and this in turn leads to cerebral thrombosis, the effects of the thrombosis are compensable.

We find this case to be controlled by *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). In *Little*, the uncontradicted evidence tended to show the plaintiff had sustained injury to her spinal cord and as a result, she suffered a "weakness in all of her extremities, and numbness or loss of sensation throughout her body." *Id.* at 531. The Supreme Court held that an award of Workers' Compensation based on the back injury alone was improper, and that if the Commission determined that plaintiff had suffered additional impairments, "the award must take into account these and all other compensable injuries resulting from the accident." *Id.* The Court remanded for further proceedings saying: "The injured employee is entitled to an award which encompasses all injuries received in the accident." 295 N.C. at 531, 246 S.E. 2d at 746. See also *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978); *Holder v. Neuse Plastic Co.*, 60 N.C. App. 588, 299 S.E. 2d 301 (1983); and *Davis v. Edgecombe Metals, et al.*, 63 N.C. App. 48, 303 S.E. 2d 612 (1983).

Thus, the *Little* case dictates that the plaintiff in this action receive an award which encompasses both her initial injury and its resultant complications. The Commission's award at present is

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not proper as it does not take into account all the complications of her injury. Although the Commission found as a fact that "[a]s a result of plaintiff's injury on December 30, 1977, she has developed phlebitis and post traumatic arthritis in both legs," we find no conclusion relating to such injuries.

The Commission's statement that "it appears that the plaintiff's injuries are to her lower extremities and possibly to the back which are specific disabilities covered by N.C.G.S. 97-31" indicates either that the Commission felt plaintiff's complications were included within the G.S. 97-31 award or that the Commission felt plaintiff was not entitled to compensation for such complications. Either way, the Commission was in error. Plaintiff's complications are not included in the schedule of G.S. 97-31, rather they are compensable under either G.S. 97-29 or G.S. 97-30.

Therefore, we remand this case for further proceedings in accordance with this opinion. We have considered plaintiff's remaining arguments and found them to be without merit.

Remanded.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. THOMAS DANIEL LOCKAMY

No. 834SC19

(Filed 15 November 1983)

1. Automobiles and Other Vehicles § 126.2— driving with blood alcohol content of .10 percent by weight—sufficiency of breathalyzer results

In light of G.S. 20-139.1 which provides that "[t]he percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 cubic centimeters of blood," evidence that a breathalyzer test showed the amount of alcohol in defendant's blood to be .10 percent was sufficient to support conviction of defendant for operating a motor vehicle with a blood alcohol content of .10 percent or more by weight although there was nothing in the record to show that defendant's blood alcohol level was measured by weight.

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2. Automobiles and Other Vehicles § 120— indictment for driving under the influence—conviction of driving with blood alcohol content of .10 percent

Defendant was not deprived of his constitutional rights to notice and due process when he was indicted under G.S. 20-138(a) for driving under the influence of intoxicants and was convicted under G.S. 20-138(b) of driving with a blood alcohol content of .10 percent or more.

3. Criminal Law § 112.1— instructions on reasonable doubt from “insufficiency of proof”

The trial court did not err in instructing that a reasonable doubt is generated by “insufficiency of proof” without instructing further that such doubt could arise “out of the evidence” since the court used the words “insufficiency of proof” to refer to an insufficiency arising out of the evidence or out of the lack of evidence.

APPEAL by defendant from *Brown, Judge*. Judgment entered 29 September 1982 in Superior Court, SAMPSON County. Heard in the Court of Appeals 26 September 1983.

Defendant was charged pursuant to G.S. 20-138 with operating a motor vehicle while under the influence of alcoholic beverages. From a jury verdict convicting him of operating a motor vehicle with a .10 percent or more blood alcohol level, defendant appeals.

The State's evidence tended to show: At about 5:45 p.m. on 1 April 1982, State Highway Patrolman Sherwood Allcox was patrolling U. S. 701 when he observed defendant's vehicle cross over the center dividing line of the highway's two southbound lanes four or five times. He also observed that defendant's vehicle was traveling considerably slower than the posted speed limit of 55 m.p.h. Trooper Allcox stopped defendant and detected an odor of alcohol on or about defendant's clothing. He also observed that defendant's face was red and his eyes were watery. The Trooper placed defendant under arrest for driving under the influence.

At the magistrate's office that same day, Trooper Allcox observed Mr. Lockamy in a performance test. Mr. Lockamy was unsure and swaying in balance and walking tests. At 6:17 p.m., State Highway Patrolman J. B. Nipper, a trained and licensed breathalyzer operator, administered a breathalyzer exam to defendant that showed the amount of alcohol in defendant's blood to be .10 percent.

The defendant's evidence tended to show: On 1 April, defendant was driving back from Florida to Clinton, North Carolina, his

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home. Defendant had left for Florida two days before and had not slept since that time. On 1 April, some time prior to 1:00 p.m., defendant had drunk two beers. He had also drunk two bottles of cough medicine because he had a bad cold. He had not consumed any other alcoholic beverages. Also, defendant had high blood pressure and had not taken his high blood pressure pills for three days.

Attorney General Edmisten, by Myron C. Banks, Special Deputy Attorney General, for the State.

Brenton D. Adams, for defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant was convicted under G.S. 20-138(b), which makes it a crime to operate a vehicle when the amount of alcohol in the blood is .10 percent or more by weight. Defendant now contends that nothing in the Record shows that his blood alcohol level was measured by weight.

The trial judge instructed the jury that the results from the breathalyzer indicated that the amount of alcohol in defendant's blood was ten one hundredths of one percent by weight. Defendant contends that this instruction was unsupported by the evidence and that the charge against him should be dismissed as a matter of law. We disagree.

The breathalyzer test in the instant case was administered by a trained, licensed breathalyzer operator. The results from such test, showing the amount of alcohol in defendant's blood to be .10 percent were competent and admissible. G.S. 20-139.1; *State v. Cooke*, 270 N.C. 644, 155 S.E. 2d 165 (1967).

Defendant cites cases from Missouri and Wisconsin holding that tests measuring alcohol in the blood by volume, rather than by weight, are inadmissible evidence. See *State v. Carwile*, 441 S.W. 2d 763 (Mo. Ct. App. 1969); *State v. Corsiglia*, 435 S.W. 2d 430 (Mo. Ct. App. 1968); *State v. Rodell*, 17 Wis. 2d 451, 117 N.W. 2d 278 (1962). The holdings in the *Corsiglia* and *Carwile* cases, which defendant relies on, were based on a Missouri statute, since amended, that provided that the percent of alcohol in the blood was based on milligrams of alcohol per milligrams of blood. The

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amended Missouri statute now provides for a weight/volume ratio of alcohol to blood. *See State v. Sinclair*, 474 S.W. 2d 865 (Mo. Ct. App. 1971). Similarly, the Wisconsin statute, since amended, provides for a measurement of blood alcohol in terms of grams of alcohol per liters of breath. *See Wis. Stat. Ann. § 885.235* (West 1983 supp.). Like the amended Missouri and Wisconsin statutes, our statute provides for a weight/volume ratio: "The percent by weight of alcohol in the blood shall be based upon milligrams of alcohol per 100 cubic centimeters of blood." G.S. 20-139.1.

In this country, we measure samples of blood alcohol by volume, and not by weight, and the results of blood alcohol tests are usually given as weight/volume and not weight/weight. *Commonwealth v. Brooks*, 366 Mass. 423, 431, 319 N.E. 2d 901, 906 (1974), *citing* Harger, *Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication*, 39 J. Crim. L. and Criminology, 402 (1948). All the widely used testing instruments that report in terms of 'percentage' or 'percentage by weight' of alcohol in the blood actually use weight/volume percentage qualification. *Id.* at 431, 319 N.E. 2d at 907.

In light of G.S. 20-139.1, which adopts the generally accepted method for measuring alcohol in a person's blood, the trial judge was correct in admitting into evidence the results of a breathalyzer test, properly administered, and in instructing the jury in regard to such evidence.

[2] In his second Assignment of Error, defendant contends that the trial court erred in instructing the jury that they could return a possible verdict finding defendant guilty of operating a motor vehicle with a .10 percent or more blood alcohol level.

G.S. 20-138 states, in pertinent part:

(a) It is unlawful . . . for any person who is under the influence of alcoholic beverages to drive or operate any vehicle
. . .

(b) It is unlawful for any person to operate any vehicle . . . when the amount of alcohol in such person's blood is 0.10 percent or more by weight . . . An offense under this subsection shall be treated as a lesser included offense of the offense of driving under the influence.

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Defendant contends that G.S. 20-138(b) is not a lesser included offense of G.S. 20-138(a) and that, therefore, he was deprived of his constitutional rights to notice and due process of law when he was charged under subsection (a) of the statute and convicted under subsection (b).

It is well-recognized in North Carolina that when a defendant is indicted for a criminal offense, he may be convicted of the charged offense or of a lesser included offense when the greater offense charged contains all the essential elements of the lesser offense. See, e.g., *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971); *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). Although driving with a blood alcohol level of .10 percent or more is not necessarily included in the offense of driving under the influence, nevertheless, the General Assembly has expressly declared that it be treated as a lesser included offense. This Court has held that G.S. 20-138(b) is a constitutional exercise of police power by the General Assembly. *State v. Luckey*, 54 N.C. App. 178, 282 S.E. 2d 490 (1981), *appeal dismissed*, 304 N.C. 731, 288 S.E. 2d 381 (1982); *State v. Basinger*, 30 N.C. App. 45, 226 S.E. 2d 216 (1976). We see no reason to part from such holding.

In *State v. Basinger*, *supra*, we explained that even though evidence of blood alcohol level, necessary under G.S. 20-138(b), was not required to convict under G.S. 20-138(a), such evidence was, nevertheless, competent and could lead to a conviction under subsection (a). When the State produces evidence of a defendant's breath or blood, a defendant is thereby put on notice by statute that he may be convicted of either G.S. 20-138(a) or (b). See *id.*

Defendant, in this case, was charged with operating a motor vehicle while under the influence of alcoholic beverages in violation of G.S. 20-138. By such charge and by the evidence produced at trial, defendant received notice that he could be convicted under subsection (b) of the named statute. The judge was correct in instructing the jury on the possibility of such a verdict.

[3] Defendant lastly contends that the trial court erred in its definition of reasonable doubt. As part of his charge to the jury, the judge instructed:

The State must prove to you that the defendant is guilty beyond a reasonable doubt.

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[Now, this does not mean satisfied beyond any doubt, nor satisfied beyond all doubt, nor does it mean satisfied beyond a shadow of a doubt, or some vain, imaginary, or fanciful doubt. A reasonable doubt is not a doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the evidence. A reasonable doubt is not a mere possible doubt for most things that relate to human affairs or ultimately some possible or imaginary doubt. A reasonable doubt is one based on common sense and reason generated by the insufficiency of proof.]

Absent a request, the trial judge is not required to define reasonable doubt and if he undertakes to give such definition, the law does not require any set formula. *See State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). The jury instruction in the instant case was in substantial accord with instructions on reasonable doubt approved by this Court and the Supreme Court in prior cases. *See State v. Faircloth*, 297 N.C. 100, 253 S.E. 2d 890, *cert. denied*, 444 U.S. 874, 100 S.Ct. 156, 62 L.Ed. 2d 102 (1979); *State v. Brackett*, 218 N.C. 369, 11 S.E. 2d 146 (1940). We do not think the jury was misled or confused by such instruction. *See State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974), *modified*, 428 U.S. 903, 96 S.Ct. 3206, 49 L.Ed. 2d 1207 (1976); *State v. Hammonds*, *supra*.

Defendant also argues that the trial judge erred in instructing that a reasonable doubt is generated by "insufficiency of proof" and in failing to instruct that such doubt could arise "out of the evidence." While it is error to instruct that a reasonable doubt arises from the evidence without also instructing that such doubt can arise from lack of evidence, an instruction such as the one in this case includes both propositions. *See State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976); *State v. Hammonds*, *supra*. "Insufficiency of proof" refers to an insufficiency arising from the evidence or from insufficiency of the evidence. 290 N.C. at 399, 226 S.E. 2d at 664. Defendant was not prejudiced by such instruction.

No error.

Judges WHICHARD and PHILLIPS concur.

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STATE OF NORTH CAROLINA v. ANSON AVERY MAYNARD

No. 8212SC1234

(Filed 15 November 1983)

1. Criminal Law § 117.4— failure to inform jury of grant of immunity and instruct jury concerning interested witness—no prejudicial error

The trial court did not commit prejudicial error by failing to "instruct the jury as in the case of interested witnesses," as required by G.S. 15A-1052(c) since (1) the statute is not applicable where there is no evidence of a formal grant of immunity, (2) the record established that the jury was fully informed of the arrangement between the witness and the prosecutor, and (3) even without the testimony of the witness, there was sufficient evidence to raise a reasonable inference of defendant's guilt of the crime for which he was charged.

2. Criminal Law § 118.2— charge on contentions of parties—no disparity

There was no merit to defendant's contention that the court erred in omitting evidence favorable to him in its summary of the evidence since (1) defendant offered no evidence but relied on evidence elicited upon cross-examination of the State's witnesses, which evidence the court did refer to, and (2) defendant failed to object to the charge at trial.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 13 July 1982 in Superior Court, HOKE County. Heard in the Court of Appeals 19 September 1983.

Defendant was charged with possession of stolen goods. Evidence for the State tended to show that defendant accompanied Jerry Wayne Scott when Scott broke into a trailer and storage building owned by John L. Owens. Scott and defendant took from the building various tools and other equipment worth approximately \$4,430. They carried the goods from rural Hoke County to Lumberton, where they sold them to Billy McGirt for \$500.00.

Scott turned State's evidence pursuant to an agreement with the prosecutor granting him immunity from prosecution, and he offered testimony incriminating defendant. Defendant offered no evidence.

From a judgment of imprisonment entered upon a verdict of guilty, defendant appeals.

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Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

WHICHARD, Judge.

I.

[1] Defendant contends he is entitled to a new trial because the court failed to inform the jury of the "grant of immunity" to the witness Scott and to "instruct the jury as in the case of interested witnesses," as required by G.S. 15A-1052(c). We find no prejudicial error warranting a new trial.

Article 61 of Chapter 15A (G.S. 15A-1051 *et seq.*), entitled "Granting of Immunity to Witnesses," was modelled after the Federal Immunity of Witnesses Act, 18 U.S.C. §§ 6001 to 6005. See G.S. 15A, Article 61 official commentary. The federal statute deals only with judicial orders of immunity, not with informal grants of immunity in the exercise of prosecutorial discretion. The parallel provision of the North Carolina statute, relating to judicial orders of immunity, is G.S. 15A-1051(a). The official commentary to this section states:

A formal grant of immunity is not conferred under this Article unless the witness is first asked the incriminating question, claims his privilege against self-incrimination, and is then ordered by a judge to answer the question notwithstanding his privilege. If he does answer the question, then immunity from prosecution is conferred. [Emphasis supplied.]

G.S. 15A-1052(a) and (b) specify the procedure by which the State must apply for such a judicial order. The official commentary indicates that the language "must be issued" in subsection (a) was intended to be mandatory on the judge "except in the most extraordinary situations," and that subsection (c) was therefore added in response to "fears that prosecutors might abuse the power of granting immunity." G.S. 15A-1052 official commentary. The subsection reads in full:

In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of

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the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses.

G.S. 15A-1052(c) (emphasis supplied). The emphasized language indicates that the subsection applies only to judicial orders of immunity, not to informal grants of immunity in the exercise of prosecutorial discretion.

This conclusion appears confirmed by the presence of G.S. 15A-1054 and -1055 and the official commentary thereto. G.S. 15A-1054(a) gives prosecutors discretionary authority to enter into arrangements "[w]hether or not a grant of immunity is conferred." The official commentary refers to these as "more informal assurance[s] of lenience" or "quasi-immunity." G.S. 15A-1054 official commentary. G.S. 15A-1055 refers in three instances to a "grant of immunity or . . . an arrangement under G.S. 15A-1054," and the official commentary makes the identical distinction. (Emphasis supplied.) The statute and the commentary thereto indicate, then, that G.S. 15A-1052(c) applies only where a judicial order granting immunity has been issued. G.S. 15A-1054(c) provides a different safeguard, *i.e.*, a requirement of written advance notice to defense counsel, where, as here, an arrangement for truthful testimony is made in the exercise of prosecutorial discretion pursuant to G.S. 15A-1054.

We are cognizant of decisions which appear to require compliance with G.S. 15A-1052(c) in cases where the witness testified pursuant to an agreement with the prosecutor under G.S. 15A-1054. *See, e.g., State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977) (witness testified under a plea bargain arrangement with prosecutor; court stated that G.S. 15A-1052(c) required instruction that he was interested witness whose testimony should be carefully scrutinized); *State v. Morgan*, 60 N.C. App. 614, 299 S.E. 2d 823 (1983) (witness granted immunity from prosecution under G.S. 15A-1054 agreement with prosecutor; failure to instruct pursuant to G.S. 15A-1052(c) one of grounds for requiring new trial). *But see State v. Pollock*, 56 N.C. App. 692, 289 S.E. 2d 588 (witness testified pursuant to agreement with prosecutor that five of six charges would be dismissed; court stated that since no grant of immunity given, scrutiny instruction not required absent special request), *disc. rev. denied and appeal dismissed*, 305 N.C.

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590, 292 S.E. 2d 573 (1982); *State v. Bagby*, 48 N.C. App. 222, 268 S.E. 2d 233 (1980) (witness testified pursuant to agreement with prosecutor for sentence recommendation; agreements for charge reduction or sentence recommendation do not constitute grant of immunity, so special request is required in order to give scrutiny instruction), *disc. rev. denied*, 301 N.C. 723, 276 S.E. 2d 284 (1981). There was no special request here. Further, in the most recent pronouncement on this question our Supreme Court stated that where there is no evidence of a formal grant of immunity, "N.C. G.S. § 15A-1052(c) (1978), which requires the trial court to inform the jury of a grant of immunity and to 'instruct the jury as in the case of interested witnesses,' is not applicable." *State v. Bare*, 309 N.C. 122, 126-127, 305 S.E. 2d 513, 516 (1983). We thus conclude that the court did not err in failing to comply with G.S. 15A-1052(c).

Conceding error, *arguendo*, defendant has not sustained his burden of showing prejudice therefrom. G.S. 15A-1443(a); *State v. Loren*, 302 N.C. 607, 613, 276 S.E. 2d 365, 369 (1981). The record establishes that the jury was fully informed of the arrangement between the witness Scott and the prosecutor. The prosecutor asked the witness whether he had entered such an agreement, and he responded in the affirmative. On cross-examination defendant elicited the following testimony: the witness had committed other crimes while under immunity in this case; he was then an inmate; he had served as an informant and was "jail wise"; he received a bond reduction in exchange for his agreement; he had promised to give defendant to the State "on a silver platter"; and he would do "just about anything" to get out of jail. The detective who originally dealt with the witness confirmed the "silver platter" and "jail wise" testimony, and testified that the prosecutor did not want to buy a "pig in a poke" in dealing with the witness. He specifically testified that the witness would not be prosecuted in this case. The court gave an accomplice instruction, directing the jury to examine the testimony of this witness "with the greatest care and caution, and in light of his interest as an accomplice." It also reminded the jury of the "silver platter" deal in its summary of the evidence. In these circumstances the jury could not have been unaware of the nature of the witness or of the agreement. *Cf. State v. Morgan, supra* (where witness consistently denied deal).

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Finally, the owner of the stolen items testified that they had been stolen between 5 January 1981 and 11 January 1981. The purchaser of the items from defendant testified that defendant brought them to his house on 10 January 1981. The owner positively identified as his the items recovered from the purchaser. Defendant sold the goods to the purchaser for substantially less than their fair market value and later warned the purchaser that the law might be "coming out." Thus, even without the testimony of the witness Scott, there was evidence sufficient to raise a reasonable inference of defendant's guilt of possession of stolen property. See *State v. Greene*, 289 N.C. 578, 223 S.E. 2d 365 (1976) (possession of stolen property one week after theft allowed inference defendant was the thief); see also *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982).

For the foregoing reasons, these assignments of error are overruled.

II.

[2] Defendant contends the court erred in omitting from its summary of the evidence "any and all evidence favorable to [him]." Defendant offered no evidence, but relied on evidence elicited upon cross-examination of the State's witnesses.

The court cited the evidence that the State's witness Scott, not defendant, had actually broken the lock on the door of the building from which the stolen tools and equipment were taken. It devoted a substantial portion of its summary to the crucial feature of defendant's case, viz, that Scott had promised "to give the Defendant to the State on a silver platter." The evidence omitted was neither substantive nor clearly exculpatory in nature, tending rather to show bias and interest on the part of the State's witnesses. The court thus was not required to summarize it. *State v. Moore*, 301 N.C. 262, 276-78, 271 S.E. 2d 242, 251-52 (1980). We find no substantive merit to this contention.

We further find that procedurally defendant has waived his right to object on appeal by failure to do so in the trial court. N.C. R. App. P. 10(b)(2); *State v. Bennett*, 308 N.C. 530, 535, 302 S.E. 2d 786, 790 (1983). At the conclusion of the charge the court excused the jury to deliberate, and immediately asked if counsel wished to note "objections, additions or omissions . . . in the

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charge." Defense counsel responded: "We have no objections." While Rule 21, General Rules of Practice for Superior and District Courts, provides that opportunity to object to the charge shall be given "before the jury begins its deliberations," it also provides that the court may recall the jury to correct its instructions. In light of this power to recall the jury, we perceive no possible prejudice to defendant in the fact that the opportunity to object was granted immediately following excusing the jury to deliberate, rather than before. Further, because defendant had no objection to offer, the timing of the opportunity to object was immaterial. *See State v. Owens*, 61 N.C. App. 342, 343, 300 S.E. 2d 581, 582 (1983).

Finally, contrary to defendant's contention, no "plain error" appears. *See State v. Odom*, 307 N.C. 655, 660-61, 300 S.E. 2d 375, 378 (1983).

No error.

Chief Judge VAUGHN and Judge PHILLIPS concur.

ELIZABETH S. ALLEN (SMITH) v. TONY PHILLIP ALLEN

No. 8221DC1134

(Filed 15 November 1983)

Divorce and Alimony § 27— child custody action—erroneous attorney fee order

An order in a child custody action directing plaintiff mother to pay fees of defendant father's attorney in the amount of \$13,860.00 and his expenses of \$2,569.20 must be vacated where it was entered without notice to or the presence of plaintiff or her counsel, and it contained no findings that defendant was acting in good faith and had insufficient means to defray the expenses of the suit.

APPEAL by plaintiff from *Tash, Judge*. Judgment entered 21 May 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 19 September 1983.

The parties, divorced in October, 1979, have a six year old daughter, whose custody has been contested since shortly thereafter, both in this Court and elsewhere. The judgment appealed

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from directs plaintiff to pay the fees of defendant's attorney in the amount of \$13,860.00 and his expenses in the amount of \$2,569.20. Earlier developments in the case pertinent hereto follow:

By the divorce judgment incorporating therein the parties' earlier contract and deed of separation, which awarded plaintiff custody of the child and allowed defendant scheduled visitation, custody and visitation have been under the court's control ever since. Both parties remarried and shortly thereafter both became dissatisfied with the custody and visitation arrangements. In February, 1980, defendant filed a motion alleging changed circumstances and requesting that custody be changed to him. Plaintiff responded, alleging defendant's failure to conform to the visitation terms and harassing telephone calls by defendant's new wife, and countermoved that defendant be adjudged in contempt. Hearings on the motion and countermotion were scheduled, continued, and rescheduled until May 19, 1980, when hearing was finally had and an order with respect thereto was entered June 9, 1980. Before the hearing, however, plaintiff's counsel was permitted to withdraw and she and the child had joined her new husband in Hawaii, and the hearing was held in her absence. By the June 9, 1980 order, the judge awarded custody of the child to defendant. In doing so the judge made just one finding of fact and one conclusion of law relating to attorney's fees as follows:

XV. THAT the Court finds that the defendant has incurred substantial attorney fees in this matter; however, the Court will reserve ruling on the amount of the attorney fees until such time as the child has been returned to the jurisdiction of Forsyth County.

6. That the plaintiff shall be responsible for the attorney fees incurred on behalf of the defendant; however, the Court will withhold ruling as to the amount of attorney fees at this time and shall rule on the attorney fees at such time as the plaintiff is brought before the Court.

In August, 1980, defendant and his attorney went to Hawaii and obtained a court order there directing plaintiff to surrender the child to him, which she did, and defendant brought the child back to North Carolina. Plaintiff obtained new counsel and in October, 1980, alleging surprise, excusable neglect and lack of

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notice, moved that the June 9, 1980 order be set aside pursuant to the provisions of Rule 60 of the Rules of Civil Procedure. By order entered 5 December 1980 the motion was denied and upon appeal to this Court the order was affirmed by an unpublished opinion filed therein March 16, 1982 [*Allen v. Allen*, 56 N.C. App. 467, 291 S.E. 2d 370 (1982)].

By motion filed April 13, 1982, plaintiff alleged a change in circumstances and requested that custody of the child be returned to her. By affidavit sworn to May 20, 1982, defendant's counsel itemized his expenses and time spent on the case, which included 72 hours in Hawaii. So far as the record reveals, a copy of the affidavit was not furnished plaintiff's counsel; nor was he notified when the court would consider defendant's affidavit and determine the matter. By judgment entered *ex parte* the next day, May 21, 1980, plaintiff was directed to pay the defendant's counsel \$13,860.00 in fees and \$2,569.20 for expenses. Though the judgment, which states it is based upon the June 9, 1980 order and counsel's affidavit, contains various findings as to the legal services rendered and appropriate hourly compensation therefor, neither it nor the June 9, 1980 order contains any finding that defendant is unable to pay the fees and expenses of his counsel.

Richard A. Lucey for plaintiff appellant.

Carl F. Parrish for defendant appellee.

PHILLIPS, Judge.

Though all proceedings appealed from are presumed to be correct until the contrary is discovered or shown, *London v. London*, 271 N.C. 568, 157 S.E. 2d 90 (1967), the presumption as to this proceeding survived only until the record was looked at. Because from any angle that the record is viewed, error is both manifest and unusually multitudinous, particularly for a routine, one problem case like this.

If Paragraphs XV and 6 of the June 9, 1980 order are deemed to constitute a valid judicial base upon which to engraft a later determination that plaintiff must pay defendant's attorney a certain sum, and they are the only base that there is, the judgment appealed from must fail, since it was not entered in accord therewith. The earlier order expressly provided that the amount of the

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attorney's fees would not be ruled on until "such time as the plaintiff is brought before the Court." Establishing the amount due from plaintiff in consultation with only counsel for the defendant, without any notice at all to plaintiff or her counsel, clearly did not meet the condition stated. But even if the order had not so provided, the *ex parte* judgment could not stand; because under our system litigating parties have a right, not only to be present, but to be heard when their substantial rights and duties are being adjudged; and having legal services that one is required to pay for determined to be worth more than \$16,000 is a substantial matter legally to any litigant.

The court, no doubt, was under the impression that, since plaintiff's responsibility for paying had already been determined, at least to his satisfaction, the amount to be paid could be determined when he saw fit without affording plaintiff the opportunity to participate therein. But determining what sum is reasonable to pay another litigant's lawyer in a custody case is a judicial, rather than a ministerial or clerical function, as the statute proceeded under, G.S. 50-13.6, plainly states, and plaintiff was entitled to have the determination made in the usual way judicial determinations are made—in court, before both parties, with each having the opportunity to present information and their views with respect to it. Nor was it just a matter of assessing the value of services, the reasonableness and necessity of which had already been established. All that the prior order determined was that defendant's counsel had rendered services and plaintiff was to be liable for them; the nature, extent, and necessity for the various services later itemized was not determined, and plaintiff had a right to question the necessity or reasonableness of any service claimed, as well as the worth of any service approved. Finally, even if the limited determination made in June, 1980 had been judicially binding, it applied only to services rendered up to that time; it certainly did not apply to future services, as the court erroneously assumed in giving value to services that were not performed until several months after the order was entered.

The prior order was no proper judicial base for requiring plaintiff to pay the fees of defendant's attorney, however, because none of the steps required by law to make plaintiff responsible for defendant's counsel fees were taken at that time. At most, it was just the expression of an intention by the court to tax de-

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fendant's counsel fees against plaintiff at some later time; it had none of the elements that make judicial determinations binding on parties and courts alike. In relevant part, G.S. 50-13.6 provides: "[T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit." This provision has been interpreted as requiring that before attorney's fees can be taxed thereunder, the facts required by the statute—that (1) movant is acting in good faith, and (2) has insufficient means to defray the expenses of the suit—must be both alleged and proved. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980). In this proceeding neither of the facts required by the statute have been either alleged or proved by the appellee; nor were they found to exist by the judge and the record contains no evidence as to either of them. Thus the judgment appealed from must be vacated. If it should later be alleged and proved that appellee is entitled to have plaintiff pay his counsel fees, in addition to the findings usually required in matters of this kind, it would be necessary in this instance, it seems to us, to make findings not merely as to the reasonableness of hourly compensation for legal services, but as to the nature and extent of the legal work done in Hawaii and whether it was necessary for North Carolina counsel to go there to accomplish it, or whether it could have been as efficaciously accomplished in much less time by counsel that was obtained there anyway.

Contrary to appellee's argument, the issue raised by this appeal was neither determined nor foreclosed by the earlier appeal. That appeal merely resolved the trial judge's refusal to set aside the July 9, 1980 order, the effective provisions of which transferred custody of the child from plaintiff to defendant. The issues then raised by plaintiff's motion were excusable neglect, notice, and the like; the issue of attorney's fees was neither raised nor raisable at that time, because no fees had been ordered. That the order, which expressed the intention to tax defendant's attorney fees against plaintiff at some future time, was not set aside does not prevent us from considering the legality of the fees that have now been assessed. Obviously, the time to contest an order based on statutory authority to award reasonable attorney's fees is when fees are awarded and not before.

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Judgment vacated.

Chief Judge VAUGHN and Judge WHICHARD concur.

EDWARD R. SCHELL v. JAMES C. COLEMAN, DON H. GARREN, AND
PEERLESS INSURANCE COMPANY, INC., A CORPORATION

No. 8229SC1291

(Filed 15 November 1983)

Attorneys at Law § 5.1; Rules of Civil Procedure § 8.1— professional malpractice action—matter in controversy exceeding \$10,000.00—failure to properly state relief demanded—failure to dismiss action—abuse of discretion

A trial judge abused his discretion by failing to dismiss plaintiff's action on the basis of a flagrant violation of Rule 8(a)(2) and the resulting adverse publicity where plaintiff stated demands in his complaint for damages totaling almost \$2 million arising from his legal malpractice claim.

APPEAL by plaintiff from *Kirby, Judge*. Judgment entered 11 March 1982 in Superior Court, HENDERSON County. Cross-appeal by defendant James C. Coleman from *Lewis, Judge*. Order entered 3 March 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 27 October 1983.

Plaintiff instituted this action against James C. Coleman to recover for alleged attorney malpractice and mismanagement of a receivership. Plaintiff also named Don H. Garren and Peerless Insurance Company, Inc. as defendants but voluntarily dismissed the action as to these parties. Defendant Coleman filed a motion to dismiss the complaint on the grounds the complaint is in violation of Rule 8(a)(2) of the North Carolina Rules of Civil Procedure in that it states a demand for monetary relief in the amount of \$1,950,000. On 3 March 1981, Judge Lewis entered an order denying defendant's motion.

Coleman later filed motions to dismiss the action, for judgment on the pleadings, and for summary judgment. After a hearing, Judge Kirby granted Coleman's motions and dismissed the complaint. From the judgment entered, plaintiff appealed. From the order denying the motion to dismiss on the grounds of the Rule 8 violation, Coleman cross-appealed.

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Lentz, Ball and Kelley by Ervin L. Ball, Jr., and Herbert L. Hyde for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice by H. Grady Barnhill, Jr., William C. Raper, and Michael E. Ray, and Petree, Stockton, Robinson, Vaughn, Glaze and Maready by Norwood Robinson for defendant appellee James C. Coleman.

HILL, Judge.

We first address the merits of Coleman's cross-assignment of error by which he argues the trial court erred in failing to dismiss plaintiff's action on the basis of the flagrant violation of Rule 8(a)(2) and the resulting adverse publicity. Rule 8(a)(2) states, in relevant part:

[I]n all professional malpractice actions . . . wherein the matter in controversy exceeds . . . ten thousand dollars (\$10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages . . . in excess of ten thousand dollars. . . .

Plaintiff clearly violated this rule when he stated demands in his complaint for damages totaling almost two million dollars arising from his legal malpractice claims.

The trial court refused to dismiss plaintiff's action on the basis of the rule violation and instead ordered that the prayer for relief be amended to allege damages in excess of \$10,000, and that "Plaintiff file a new Page 5 [of the complaint] to conform with the Amendment as ordered above." Coleman notes that plaintiff never sought to amend his complaint to comply with the rule, rather the amendment was ordered by the court on its own initiative. Moreover, Coleman claims the record shows that plaintiff has never filed the corrected Page 5 as ordered by the court and that the offensive prayer for relief remains as originally stated.

The question of the propriety of the use of the Rule 41(b) power of dismissal as a sanction for violation of the Rule 8(a)(2) proscription has only recently been addressed by this Court. In *Jones v. Boyce*, 60 N.C. App. 585, 299 S.E. 2d 298 (1983), which was the first case in which this Court interpreted Rule 8(a)(2), it was held that the Rule 41(b) power of dismissal was a permissible

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sanction for violation of Rule 8(a)(2). *Jones* was an attorney malpractice action brought *pro se* by an inmate at Central Prison. In the *ad damnum* clause of the complaint, plaintiff prayed for a total of three million dollars in damages. Defendant moved that the action be dismissed pursuant to Rule 41(b) for plaintiff's failure to comply with Rule 8(a)(2). Plaintiff moved to amend the complaint. The court refused to allow amendment and granted defendant's motion to dismiss.

On appeal, this Court held the trial court did not abuse its discretion in denying the motion to amend and in dismissing the action in its entirety. The court explained:

The General Assembly enacted G.S. 1A-1, Rule 8(a)(2), in response to a perceived crisis in the area of professional liability insurance. A study commission thereon recommended "elimination of the *ad damnum* clause in professional malpractice cases [to] avoid adverse press attention prior to trial, and thus save reputations from the harm which can result from persons reading about huge malpractice suits and drawing their own conclusions based on the money demanded." (Citation omitted.)

. . . .

Rule 8(a)(2) prescribes no penalty for violation of its proscription against stating the demand for monetary relief. Absent application of the Rule 41(b) provision for dismissal for violation of the rules, litigants could ignore the proscription with impunity, thereby nullifying the express legislative purpose for its enactment.

Jones v. Boyce, 60 N.C. App. at 587, 299 S.E. 2d at 300.

In *Harris v. Maready*, 64 N.C. App. 1, --- S.E. 2d --- (1983), this Court relying on *Jones v. Boyce*, *supra*, held the trial court abused its discretion by failing to allow the defendant's motion to dismiss for a violation of Rule 8(a)(2). In *Harris*, which was also an attorney malpractice action, the plaintiff stated in several parts of the complaint her demand to recover damages of five million dollars. Defendant moved to dismiss the action on the grounds the complaint violated Rule 8(a)(2), which motion was denied. The plaintiff purported to amend her complaint as a matter of right

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but in so doing failed to delete all of the offending paragraphs. As a result, it was still clear from a reading of the complaint as a whole that the action was one based on professional malpractice which contained a demand for damages of five million dollars.

The court's holdings in these cases do not dictate that a court *must* dismiss an action if there is a Rule 8(a)(2) violation. The Rule 41(b) power of dismissal is only a permissible sanction, not a mandatory one. Allowance of a motion to dismiss on the basis of a Rule 8 violation is discretionary with the court. *See Jones, supra* at 586. But as illustrated by *Harris*, an abuse of discretion may be found if the court denies a motion to dismiss when there was a flagrant violation of the rule.

The present case illustrates the type of violation which is flagrant and justifies the extreme sanction of a Rule 41(b) dismissal. Like the plaintiff in *Harris*, the plaintiff here was allowed the opportunity to cure his violation by amending the complaint yet he failed to do so. Furthermore, plaintiff aggravated the violation by having Coleman served in open court, by informing the North Carolina Department of Insurance that a lawsuit existed against attorneys James C. Coleman and Don Garren in the amount of two million dollars (\$2,000,000) for misappropriations, and by causing adverse radio and newspaper publicity.

Soon after plaintiff initiated this action, articles appeared in the *Asheville Citizen* and the *Times-News* of Hendersonville entitled respectively, "2 Hendersonville Attorneys Named in \$2 Million Suit" and "Local Lawyers Sued" in which specific reference was made to the amount of the claim for damages. Additionally, a radio station in Hendersonville, North Carolina broadcasted hourly on 23 October 1980 similar reports of plaintiff's two million dollar lawsuit against Coleman. Coleman stated he received telephone calls from friends, clients and other attorneys about the adverse publicity.

Plaintiff's violation of Rule 8(a)(2) may have caused irreparable harm to Coleman's professional reputation and to his ability to receive a fair trial. Such are the evils sought to be avoided by the rule. Given the flagrant and aggravated nature of plaintiff's violation of the rule, we are compelled to hold the trial court abused its discretion in denying defendant's motion to dismiss.

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Plaintiff has raised on appeal the question of the constitutionality of Rule 8(a)(2). This issue was not raised or considered in the trial court; therefore, it is not properly before us. See *Durham v. Manson*, 285 N.C. 741, 208 S.E. 2d 662 (1974); *Management, Inc. v. Development Co.*, 46 N.C. App. 707, 266 S.E. 2d 368, *appeal dismissed*, 301 N.C. 93, 273 S.E. 2d 299 (1980).

In our discretion under Rule 2 of the North Carolina Rules of Appellate Procedure, we would like to address briefly the merits of plaintiff's appeal. Plaintiff assigns as error the entry of summary judgment against him. Plaintiff alleged that Coleman negligently and willfully failed to discharge his duty as a receiver of property owned in part by plaintiff, and negligently and willfully failed to faithfully and adequately represent plaintiff as his attorney. The court after considering the pleadings, the file in the case in which Coleman allegedly failed to adequately represent plaintiff, plaintiff's deposition, and the arguments and briefs of the parties, concluded that defendant was entitled to summary judgment. We agree.

The evidence tends to show that Coleman adequately and properly represented plaintiff as his attorney and exercised reasonable care and diligence in the use of his skills. It further shows that Coleman as receiver acted at the direction and by the authority of the court administering the receivership. Plaintiff has asserted disagreement with Coleman's professional judgment and dissatisfaction with the way the receivership property was managed, but he has not produced any evidence to support his claims that Coleman is guilty of negligence or wrongful conduct. Therefore, the trial court correctly granted summary judgment for defendant.

Affirmed.

Judges BECTON and JOHNSON concur.

Population Planning Assoc. v. Mews

POPULATION PLANNING ASSOCIATES, INC. v. LINDA MEWS AND ROMEO, INC.

No. 8215SC1145

(Filed 15 November 1983)

1. Judgments § 10— breach of consent judgment—jury question

A jury question was presented as to whether defendants breached a consent judgment by using an old Carrboro post office box address in magazine advertising for their mail order business after June 1980 where the judgment required defendants to use a Chapel Hill rather than a Carrboro address in their magazine advertising after June 1980, plaintiffs presented evidence that defendants sent orders for advertisements to be "picked-up" and reused by publications after June 1980, and defendants presented evidence that advertisements with the old address were published after June 1980 due to publisher error. However, the evidence was insufficient to be submitted to the jury on the issue of defendants' willful violation of the consent judgment.

2. Unfair Competition § 1— use of address similar to competitor's—no unfair trade practice

The use of an address which is similar to a competitor's address is not equivalent to "passing-off" one's goods as those of the competitor and does not constitute an unfair trade practice within the purview of G.S. 75-1.1 *et seq.*

3. Evidence § 41— opinion testimony—invasion of province of jury

The trial court properly refused to permit plaintiff's president to state his opinion as to the amount of damages suffered by plaintiff's mail order business as the result of defendants' use of its old mailing address in magazine advertising in breach of a consent judgment since the amount of damages was the ultimate issue to be determined by the jury, and the witness could only give factual testimony from which the jury could arrive at the amount of damages.

4. Rules of Civil Procedure § 70— damages for breach of consent judgment—Rule 70 motion inappropriate

Where plaintiff's complaint stated a claim for damages for breach of a consent judgment which required a specific act, a G.S. 1A-1, Rule 70 motion to enforce the consent judgment by an order that the act be performed by "another party appointed by the judge" would not be appropriate.

APPEAL by plaintiff from *Martin (John C.)*, Judge. Judgment entered 4 June 1982 in Superior Court, ORANGE County. Heard in the Court of Appeals 22 September 1983.

Before June of 1978, Linda Mews was Vice President and General Manager of Population Planning Associates, Inc., doing business as Adam & Eve. In that capacity, she supervised Adam & Eve's advertising in various publications. Adam & Eve, a mail

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order business, had used the following address in their advertisements for eight years: P.O. Box 400, Carrboro, North Carolina 27510.

On 7 June 1978, Mews left the employment of Population Planning Associates, Inc. On 20 June 1978, she formed a North Carolina corporation, Romeo, Inc. On 28 June 1978, Romeo, Inc., began operating a mail order business which sold essentially the same products as Adam & Eve. The address that Romeo, Inc. used in its advertisements was: P.O. Box 200, Carrboro, North Carolina 27510. Romeo, Inc. and Adam & Eve advertised in many of the same magazines.

In August of 1978, Population Planning Associates instituted a lawsuit against Mews and Romeo, Inc., concerning, *inter alia*, the use of the similar Carrboro address in Romeo, Inc.'s advertisements. The lawsuit was settled through a consent judgment on 18 February 1980. The consent judgment required Romeo, Inc. to secure and utilize a Chapel Hill Post Office box address for all advertisements in *Playgirl*, *Penthouse*, and *Oui* magazines beginning with the June 1980 issues and in all other consumer publications beginning with the July 1980 issues. These deadlines allowed for the required lead time for placing or changing advertisements in the magazines.

Subsequent to June 1980, advertisements for Romeo appeared in both *Playgirl* and *Penthouse* with the Carrboro address. On 22 December 1980, Population Planning Associates filed a complaint against Mews and Romeo, Inc., alleging breach of the consent judgment, willful violation of the consent judgment, fraud in cashing checks made payable to plaintiff, failure to send misdirected mail to plaintiff, and unfair and deceptive trade practices in violation of G.S. 75-1.1 *et seq.* Plaintiff alleged damages of \$7,000.00.

On 1 June 1982, the trial court granted defendants' Rule 12(b)(6) motion to dismiss the third and fourth claims for relief (fraud in cashing plaintiff's checks and failure to redirect plaintiff's mail) for failure to state a claim for relief. Their Rule 12(b)(6) motion was denied with respect to the first, second and fifth claims for relief (breach of the consent judgment, willful violation of the consent judgment, and unfair trade practices). The case was tried before a jury. At the close of the plaintiff's

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evidence, the trial judge granted defendants' motion for directed verdict as to all remaining claims.

From this judgment, plaintiff appeals. Defendant cross-appeals the trial court's denial of defendants' Rule 12(b)(6) motion with respect to plaintiff's first, second and fifth claims for relief.

Manning, Osborn & Frankstone, by J. Kirk Osborn, for plaintiff-appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., for defendant-appellees.

EAGLES, Judge.

Plaintiff's first assignment of error is that the trial court erred at the end of all the evidence when it granted defendants' motion to dismiss plaintiff's first (breach of the consent judgment), second (willful violation of the consent judgment), and fifth (unfair trade practices) claims for relief. In considering defendants' motion for a directed verdict pursuant to Rule 50 of the Rules of Civil Procedure, the question presented is whether all the evidence which supports plaintiff's claim, when taken as true, considered in the light most favorable to plaintiff and given the benefit of every reasonable inference in the plaintiff's favor which may be legitimately drawn therefrom, is sufficient for submission to the jury. *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980). A directed verdict motion by defendants may be granted only if the evidence is insufficient, as a matter of law, to justify a verdict for plaintiff. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979).

[1] Plaintiff's first claim for relief alleges that defendants breached the consent order by using the old Carrboro post office box designation in advertising after June 1980. Plaintiff's evidence showed that defendants published 12 advertisements in various publications that were in violation of the consent judgment, that defendants had requested publications to "pick up" and reuse advertisements that had used the old Carrboro address for Romeo, Inc. instead of preparing and submitting to the publications new advertisements on which the new address was printed, and that defendants sent insertion orders for advertisements with the old address to be "picked up" and reused by

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publications after June 1980. Through cross examination, defendants presented evidence showing that advertisements with the old address were published after June 1980 due to publisher error. This presents a factual dispute as to whether defendants complied with the consent judgment. A verdict may not be directed when the facts are in dispute, and the credibility of testimony is for the jury, not the trial judge. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). Here, there was a question of fact to be determined by the jury, and we hold that the directed verdict as to the first claim for relief was improperly granted.

Plaintiffs second claim for relief alleges that defendants willfully violated the consent judgment. Although plaintiff's evidence tends to show a violation of the consent judgment by publication of Romeo, Inc. advertisements with the old Carrboro address, there was no evidence presented to indicate that defendants acted willfully. The evidence shows that defendants' insertion orders for advertisements with the old address to be "picked up" and reused by publications after June 1980 were mailed after defendants had already informed those publishers that the Carrboro address was not to be used in any future ads. Because there was no evidence that defendants willfully violated the consent judgment, we hold that the directed verdict as to the second claim was properly granted.

[2] Plaintiffs fifth claim for relief alleges that defendants' violation of the consent judgment constituted an unfair trade practice in violation of G.S. 75-1.1 *et seq.* We find no merit in plaintiff's contention that use of an address that is similar to a competitor's address is equivalent to "passing off" one's goods as those of a competitor and constitutes an unfair trade practice. We find that plaintiff introduced no evidence that defendants published false or misleading advertisements so as to perpetrate an unfair or deceptive act or practice or an unfair method of competition within the meaning of G.S. 75-1.1 *et seq.* See, *Harrington Mfg. Co. v. Powell Mfg. Co.*, 38 N.C. App. 393, 248 S.E. 2d 739 (1978), *rev. and cert. denied*, 296 N.C. 411, 251 S.E. 2d 469 (1979). The directed verdict as to the fifth claim was properly granted.

[3] Plaintiff's final assignment of error is that the trial court erred in sustaining defendants' objections to opinion testimony by Phil Harvey, the President of Adam & Eve and of another mail

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order firm, as to the amount of damages to the plaintiff as a result of the publication of defendants' advertisements with the old Carrboro address. Opinion evidence is not generally admissible if, in lieu of stating his conclusion, the witness can relate the facts so that the jury will have an adequate understanding of them and if the jury is as well qualified as the witness to draw inferences and conclusions from the facts. 1 Brandis, N.C. Evidence § 124 (2d rev. ed. 1982). Here, plaintiff questioned Harvey on his familiarity with mail order marketing and then asked his opinion as to plaintiff's damages as a result of the publication of defendants' advertisements with the old Carrboro address. Defendants' objections to Harvey giving his conclusory opinion as to the amount of damages were properly sustained. Here the amount of damages is the ultimate issue to be determined by the jury. See, *Lowe v. Hall*, 227 N.C. 541, 42 S.E. 2d 670 (1947). Harvey's testimony was properly restricted to offering factual testimony from which the jury could arrive at an amount of damages. See, 1 Brandis, N.C. Evidence § 126 n. 62 (2d rev. ed. 1982).

[4] Defendants cross-assign as error the trial court's denial of defendants' Rule 12(b)(6) motion with respect to plaintiff's first, second and fifth claims for relief. Defendants contend that the appropriate relief from noncompliance with a consent judgment is a proceeding pursuant to Rule 70, N.C. R. Civ. P. Rule 70 empowers the court to enforce a judgment that requires performance of a "specific act" by ordering that the act be done by "another party appointed by the judge." A motion pursuant to Rule 70 would be proper here if plaintiff simply wanted specific performance. Here, plaintiff alleged damages as a result of noncompliance, and where damages are alleged because of noncompliance with a consent judgment, a Rule 70 motion is inappropriate. The present lawsuit is the appropriate avenue by which plaintiff may seek relief.

The denial of the motion to dismiss plaintiff's claims merely served to allow the action to be tried. No final judgment was involved at that point, and defendant was not deprived of any substantial right which could not be protected by timely appeal from the trial court's ultimate disposition of the case. An adverse ruling on a Rule 12(b)(6) motion is in most cases an interlocutory order from which no direct appeal can be taken. *State, Child Day-Care Licensing Comm'n v. Fayetteville Street Christian School*, 299 N.C. 351, 261 S.E. 2d 908, *appeal dismissed*, 449 U.S. 807, 101

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S.Ct. 55, 66 L.Ed. 2d 11 (1980). Because we uphold the directed verdict granted against plaintiff in the second and fifth claims for relief, we need not address the denial of the Rule 12(b)(6) motions as to these claims. As to the first claim, the allegations of the complaint must be taken as true, and on that basis the court must decide as a matter of law whether the allegations state a claim for which relief may be granted. See *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). We hold that the allegations of plaintiff's first claim of action state a valid claim for breach of the consent judgment, and we therefore uphold the trial court's denial of defendants' Rule 12(b)(6) motion as to that claim.

Directed verdict is reversed and new trial is ordered as to plaintiff's first claim for relief.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. GLENN JUNIOR POTTS

No. 8317SC125

(Filed 15 November 1983)

1. Criminal Law § 138— aggravating factor that defendant took advantage of position of trust—properly submitted

In a sentencing hearing upon defendant's plea of guilty to second degree murder, the trial court properly considered as an aggravating factor that defendant took advantage of a position of trust and confidence to commit the offense. The evidence tended to show that deceased was referred to as one of defendant's "best friends," that minutes prior to the shooting deceased told defendant, "I thought we were friends," and defendant responded that they were; that deceased stated, "Well, we've been just like brothers. So why are you trying to mess over me?"; that after deceased was asked to leave, deceased indicated that he was going to stay because he knew defendant would not hurt him.

2. Criminal Law § 138— aggravating factor that victim mentally infirm at time killed—properly submitted

In a sentencing hearing upon defendant's plea of guilty to second degree murder, the trial court properly found as an aggravating factor that the victim was mentally infirm at the time he was killed where the evidence tended to show that defendant and deceased spent a short period of time drinking beer, wine and almost a fifth of vodka, smoking marijuana and taking quaaludes;

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during this time and while in defendant's presence, deceased crushed a glass in his hand and smashed a chair against the wall; after deceased and defendant began fighting, deceased twice told defendant to shoot him; and deceased refused to leave the trailer park after defendant obtained his shotgun. Further, it would be unreasonable and unfair to allow defendant's intoxication to be considered a mitigating factor but not to allow the victim's intoxication to be an aggravating factor. G.S. 15A-1340.4(a)j.

APPEAL by defendant from *Hairston, Judge*. Judgment entered 18 October 1982 in Superior Court, SURRY County. Heard in the Court of Appeals 18 October 1983.

Defendant was indicted for the first degree murder of Terry Craig Tilley. Defendant pleaded guilty to second degree murder, and in return, the State agreed to dismiss two related kidnapping charges.

The State offered evidence at the lengthy sentencing hearing tending to show that on the evening of 19 March 1982 Tilley and his girlfriend, Lisa Bowman, visited Brenda Gwen at her trailer in Mount Airy, North Carolina. Defendant and his brother were at the trailer. Defendant and Tilley sat around listening to music and drinking vodka. Around 7:00 p.m. the two women left the trailer and returned an hour later with marijuana and quaaludes. They gave the drugs to defendant and Tilley. Defendant then began arguing with Gwen and threatened to kill her. Bowman became alarmed and ran to get Tilley. Tilley had earlier left the trailer and was attempting to crank defendant's van. Tilley returned to the trailer and asked defendant why he was threatening Gwen. Defendant replied that Gwen had not cashed a check for him. Tilley and defendant then began arguing about the check, and Tilley slapped defendant's face. Defendant indicated he was leaving, but Tilley suggested they talk and promised not to hit him again.

Tilley's brother ran to a nearby trailer and asked Bobby Beck to break up the fight between defendant and Tilley. When Beck reached Gwen's trailer, Tilley had his fist balled up and said, "I am fixing to eat both of you (Beck and defendant) up." Defendant then ran to Beck's trailer. Tilley and Beck followed. Defendant grabbed a shotgun from under Beck's couch, and Tilley began struggling with him. Tilley then backed off, unbuttoned his shirt and told defendant to shoot him. Discovering that the shotgun

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was not loaded, defendant asked Beck for shells. Beck responded that he had none. Tilley was then persuaded to leave the trailer. After Tilley left, defendant demanded that Beck give him his pistol. Defendant walked to the porch of the trailer with the pistol in his hand. Tilley was standing outside. He dropped his arms and told defendant, "Go ahead and kill me if that is what you want." Defendant fired at Tilley five or six times. He then walked over to Tilley's body and began beating him in the face with the pistol. Defendant returned to Beck's trailer and wiped blood from his hands. Several minutes later, he walked outside and again started beating Tilley's face.

Defendant presented evidence that he and Tilley began drinking wine and beer around 2:00 p.m. on 19 March 1982. Later in the day they shared a fifth of vodka, smoked marijuana and swallowed quaaludes. Defendant's former probation officer testified that defendant cooperated with him during his probation period. Defendant had been on probation for driving under the influence and two felonious assault convictions. There was further testimony that defendant's drinking increased when he lost his job a month before Tilley's murder.

After considering the foregoing evidence the sentencing judge found the following aggravating factors pursuant to G.S. 15A-1340.4(a)(1):

10. The victim was very young, or very old, or mentally or physically infirm.

14. The defendant took advantage of a position of trust or confidence to commit the offense.

15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

The following mitigating factor was found pursuant to G.S. 15A-1340.4(a)(2):

4. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.

After concluding that the aggravating factors outweighed the mitigating factor, the judge sentenced defendant to 40 years. From this sentence, defendant appeals.

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Attorney General Rufus L. Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

W. David White, by W. David White, for defendant appellant.

ARNOLD, Judge.

Defendant assigns as error the first two aggravating factors found by the court and the court's failure to find more than one mitigating factor. After careful examination of both the evidence introduced at the sentencing hearing and the recent application of the Fair Sentencing Act, we conclude that the sentence is supported by the evidence and must be affirmed.

Under the Fair Sentencing Act, the sentencing judge's discretion to impose a sentence greater or lesser than the presumptive term is bridled by the statutory requirement that he make written findings of aggravating and mitigating factors. The judge may consider such factors "that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purpose of sentencing" G.S. 15A-1340.4(a). *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). "The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony." *Id.* at 596, 300 S.E. 2d at 697. We find that this standard of review was properly applied in the case now before us.

[1] Defendant argues that the court erred in finding as an aggravating factor that he took advantage of a position of trust and confidence to commit the offense. In making this finding the judge commented, "Your friend trusted you, he opened his hands to you and said, 'Come on, kill me. I don't think you will do it.'" Defendant points out that our appellate courts have upheld a finding of this aggravating factor in one instance: where the defendant was charged with attempted rape of his ten year old stepdaughter. *State v. Goforth*, 59 N.C. App. 504, 297 S.E. 2d 128 (1982), *reversed and remanded for resentencing on other grounds*, 307 N.C. 699, 307 S.E. 2d 162 (1983). He argues that the fact that he and Tilley knew each other while serving time in prison and that

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Tilley urged defendant to kill him immediately before the shooting, is not sufficient evidence of a relationship which would inspire confidence or trust.

Throughout the sentencing hearing witnesses testified that defendant and Tilley were good friends. Bobby Beck referred to Tilley as one of defendant's "best friends." Brenda Gwen testified that minutes prior to the shooting Tilley told defendant, "I thought we were friends." Defendant responded that they were. Tilley then stated, "Well, we've been just like brothers. So why are you trying to mess over me?" Defendant's brother testified that after Tilley and defendant struggled over the shotgun, he asked Tilley to leave. Tilley indicated that he was going to stay because he knew defendant would not hurt him.

The foregoing evidence was sufficient for the court to find that because of the defendant's and Tilley's friendship, Tilley trusted defendant not to kill him. Defendant violated this position of trust.

[2] Defendant next argues that the sentencing judge erred in finding as an aggravating factor that the victim was mentally infirm at the time he was killed. The judge noted that the preponderance of the evidence showed that Tilley was drunk and defendant knew it. Defendant, however, urges this Court to find that voluntary intoxication of the victim is not included within the definition of mental infirmity as it applies to G.S. 15A-1340.4(a)(1)j. The word "infirm" is not defined in this statute. Webster's New Collegiate Dictionary (1977) defines "infirm" as "weak of mind, will or character." The evidence presented comports with this definition.

The evidence at the sentencing hearing was that defendant and Tilley spent a short period of time drinking beer, wine and almost a fifth of vodka, smoking marijuana and taking quaaludes. During this time and while in defendant's presence, Tilley crushed a glass in his hand and smashed a chair against the wall. After Tilley and defendant began fighting, Tilley twice told defendant to shoot him. He refused to leave the trailer park after defendant obtained a shotgun. This evidence clearly shows that Tilley's capacity to recognize the danger of the situation, and to therefore remove himself, was weakened by his intoxication. It is

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also uncontradicted that defendant was aware of Tilley's intoxicated condition.

Intoxication of the defendant has been recognized as a mitigating factor by the courts under G.S. 15A-1340.4(a)(2)d: "The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense." In fact, the sentencing judge here found this to be a mitigating factor. It would be both unreasonable and unfair to allow defendant's intoxication to be considered a mitigating factor but not to allow the victim's intoxication to be an aggravating factor. Clearly the Legislature did not intend this result.

Defendant's remaining assignments of error involve the failure of the sentencing judge to find that the victim was a voluntary participant in the crime; that defendant committed the crime under duress, threat or compulsion and which significantly reduced his culpability and that defendant's immaturity or limited mental capacity reduced his culpability. We find no merit to these assignments of error.

In a recent decision the North Carolina Supreme Court found that under the Fair Sentencing Act, the judge is required to find factors proved by uncontradicted and manifestly credible evidence. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Here, there is no such evidentiary support for a finding that the victim was a voluntary participant in the shooting. The evidence shows that Tilley was unarmed at all times. We also find no error in the court's refusal to find that defendant committed the murder under duress, coercion, threat or compulsion or that defendant's immaturity and limited mental capacity significantly reduced his culpability. The preponderance of the evidence shows and the judge found that defendant's culpability was reduced solely by his intoxicated condition.

Defendant has failed to show prejudicial error in his sentencing hearing, and the judgment is

Affirmed.

Judges HILL and BRASWELL concur.

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STATE OF NORTH CAROLINA v. BILLY LEVON OWENS

No. 8313SC227

(Filed 15 November 1983)

1. Homicide § 21.7— second degree murder—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for second degree murder where it tended to show that defendant threw a cigarette butt at the victim and the victim threw it back; defendant verbally threatened the victim and then shot him; the victim was unarmed; and defendant had not been threatened or assaulted by the victim.

2. Assault and Battery § 14.2— felonious assault with deadly weapon—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for felonious assault with a deadly weapon where it tended to show that defendant shot the victim in the right forearm and that the victim received medical treatment at a nearby hospital. G.S. 14-32.

3. Criminal Law § 113.5— sufficiency of charge on alibi

The trial judge summarized defendant's alibi evidence to the extent necessary to apply the law thereto when he instructed that defendant was contending he was not present at the time of the crime and explained the law applicable if the jury believed defendant's alibi testimony.

4. Homicide § 30.2— second degree murder case—instruction on voluntary manslaughter not required

Evidence in a second degree murder case that the victim threw a cigarette butt at defendant did not permit a finding that defendant acted in the heat of passion resulting from a sudden provocation so as to require the trial court to submit voluntary manslaughter as a possible verdict.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 16 September 1982 in COLUMBUS County Superior Court. Heard in the Court of Appeals 26 October 1983.

Defendant Billy Levon Owens was charged with the second-degree murder of Ronnie Dale Nance and felonious assault with a deadly weapon upon Alton Lynn Williamson, at the Red Barn nightclub in Columbus County on 9 January 1982.

Evidence for the state tended to show the following events. About midnight on 9 January 1982, defendant, Nance, Williamson and others were in the parking lot of the Red Barn nightclub. Defendant threw a cigarette butt at Nance and Nance threw it back. Defendant verbally threatened Nance and Williamson and

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then shot both of them. Nance was hit in the chest and died of his injuries. Williamson was shot in the right forearm and received medical treatment at a nearby hospital.

Evidence for the defense tended to show that defendant and some friends went to the Red Barn about 8:30 p.m. on 9 January 1982, where they stayed until about 10:00 p.m. Defendant and his friends then left the nightclub and returned to Dillon, South Carolina, where they lived. Defendant was not carrying any weapons, had no arguments with anyone that night and had never met Nance or Williamson.

Following a three-day jury trial, defendant was convicted of second-degree murder and assault with a deadly weapon inflicting serious injury. Defendant was sentenced to a total of thirty-three years in prison for the offenses. From entry of judgment on the verdicts, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Sessoms and Williamson, by William J. Williamson, and Soles and Phipps, by R. C. Soles, Jr., for defendant.

WELLS, Judge.

In his first assignment of error, defendant argues the trial judge erred in failing to grant his motion to dismiss at the close of the evidence. A motion to dismiss tests the sufficiency of the evidence to go to the jury and is properly denied if there is substantial evidence of all material elements of the offense charged. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). The evidence is considered in the light most favorable to the state, giving it the benefit of all reasonable inferences which can be drawn from the evidence. *Id.*

[1] In the case at bar, the evidence taken in the light most favorable to the state was clearly sufficient to go to the jury on the issue of second-degree murder and assault with a deadly weapon. Second-degree murder is the unlawful killing of a human being with malice, but without premeditation or deliberation. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1976). Malice can be proven by conduct evincing reckless or wanton disregard

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for human life. *Id.* In the case at bar, there was evidence that defendant was armed and the victims were not, and that defendant was the aggressor and had not been threatened or assaulted by the victims. This is sufficient evidence of malice to go to the jury.

[2] Felonious assault with a deadly weapon under G.S. § 14-32 can be shown by evidence of assault with a deadly weapon with intent to kill inflicting serious injury or an assault with a deadly weapon without intent to kill inflicting serious injury. The evidence in the case at bar clearly indicates that a deadly weapon—a gun—was used against Williamson, and that Williamson was wounded in the right arm. This raises sufficient evidence of a serious injury to go to the jury. Defendant's assignment of error is overruled.

[3] Defendant next argues that the trial judge erred by failing to summarize the evidence supporting defendant's alibi defense. A trial judge need only summarize the evidence to the extent necessary to apply the law relevant to the case. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978), G.S. § 15A-1232. The trial judge in this case correctly instructed the jury that defendant was contending he was not present at the time of the fatal shooting, and explained the law applicable if they believed defendant's alibi testimony. This assignment of error is overruled.

[4] In his third assignment of error, defendant contends that the trial judge erred by failing to submit voluntary manslaughter as a possible verdict. Voluntary manslaughter is a lesser included offense of second-degree murder, *State v. Holcomb*, 295 N.C. 608, 247 S.E. 2d 888 (1978), and where there is some evidence of a lesser included offense, the trial judge must submit the issue to the jury even without a request by defendant. *State v. Oxendine*, 305 N.C. 126, 286 S.E. 2d 546 (1982). We hold, however, that there was insufficient evidence of voluntary manslaughter presented at trial to warrant an instruction on this offense. Evidence of voluntary manslaughter may be raised by testimony showing defendant acted in the heat of passion resulting from a sudden provocation or that he used excessive force in self-defense. *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980). There was no evidence in the case at bar that defendant acted in self-defense. Defendant argues, however, that the state's evidence indicates Nance threw

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a cigarette butt at him before the shooting, raising the issue of provocation and requiring a jury instruction on voluntary manslaughter. We disagree. The law requires a showing of strong provocation before it will grant a defendant who is charged with second-degree murder a jury instruction on the lesser included offense of voluntary manslaughter. For example, mere insulting words do not constitute sufficient provocation. *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975). Generally, there must be an assault or threatened assault to create the level of provocation required. *Id.* See also *State v. Williams*, 296 N.C. 693, 252 S.E. 2d 739 (1979); *State v. Spicer*, 50 N.C. App. 214, 273 S.E. 2d 521, *app. dismissed*, 302 N.C. 401, 279 S.E. 2d 356 (1981). We hold that evidence that Nance threw a cigarette butt at defendant does not rise to the level of serious provocation required. *Accord*, 40 Am. Jur. 2d 29, Homicide, § 62 (1968 & 1983 Supp.).

In his fourth assignment of error, defendant argues that the trial judge should have submitted a jury instruction on misdemeanor assault with a deadly weapon, under G.S. § 14-33 as well as the charge of felonious assault with a deadly weapon, under G.S. § 14-32. Misdemeanor assault with a deadly weapon is a lesser included offense of felonious assault with a deadly weapon, *State v. Weaver*, 264 N.C. 681, 142 S.E. 2d 633 (1965).

An examination of the record shows, however, that the error was the failure of the trial judge to submit a possible verdict of misdemeanor assault to the jury, with proper instructions. In North Carolina, a trial judge must submit lesser included offenses as possible verdicts, even in the absence of a request by the defendant, where sufficient evidence of the lesser offense is presented at trial. *State v. Weaver*, *supra*, citing *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954) (assault with a deadly weapon a lesser included offense of robbery). See also *State v. Oxendine*, *supra* (1982) (voluntary manslaughter a lesser included offense of second-degree murder). (Many other jurisdictions require a defendant to request a jury instruction on lesser included offenses. See generally 75 Am. Jur. 2d "Trial" § 877 (1974 & 1983 Supp.).)

We hold that in the case at bar, sufficient evidence was presented to require the trial judge to submit misdemeanor assault as a possible verdict to the jury. The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault

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requires a showing that a deadly weapon was used *and* serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor. In the case at bar, it is clear that a deadly weapon was used against Williamson. Thus, if there was some evidence that Williamson's injury was not serious, a verdict of misdemeanor assault should have been submitted to the jury. A judge may instruct a jury that an injury is serious as a matter of law where ". . . the evidence is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted." *State v. Pettiford*, 60 N.C. App. 92, 298 S.E. 2d 389 (1982). Factors our courts consider in determining if an injury is serious include pain, loss of blood, hospitalization and time lost from work. *See e.g., State v. Pettiford, supra; State v. Stephenson*, 43 N.C. App. 323, 258 S.E. 2d 806 (1979), *pet. for disc. rev. denied*, 299 N.C. 124, 262 S.E. 2d 8 (1980).

In the case before us, however, the record states only that Williamson was treated at a hospital for about three hours. There was no evidence as to the degree of injury to Williamson, either immediate or residual. Such evidence does not warrant an instruction that the wound was serious as a matter of law, since reasonable minds could differ on the issue. Thus, the question was for the jury and defendant must receive a new trial as to the assault charge.

It is not disputed that at the time of sentencing, defendant was seventeen years old. Both parties note and we agree, that the trial judge erred in failing to determine whether defendant would benefit from being sentenced as a committed youthful offender as required under G.S. § 148-49.14, and G.S. § 15A-1340.4(a) for defendants under the age of twenty-one. Under these circumstances, the case must be remanded for resentencing.¹

As to the assault charge

1. We also note that in passing sentence, the trial judge found as an aggravating factor, the fact that defendant was armed with a deadly weapon at the time of the crime. This was error. Since use of a deadly weapon is an element of the crime of felonious assault, it may not also be considered as a factor in aggravation. *State v. Hammonds*, 61 N.C. App. 615, 301 S.E. 2d 457 (1983).

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New trial.

As to the charge of second-degree murder

No error.

Remanded for resentencing.

Chief Judge VAUGHN and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. ROBERT EARL OATES

No. 824SC1294

(Filed 15 November 1983)

Criminal Law § 102.8— prosecutor's comment during final argument upon defendant's failure to testify—prejudicial error

A prosecutor's comment during final argument upon the defendant's failure to testify was prejudicial error requiring a new trial where the trial court did not instruct the jury that the comment was improper or why it was improper but merely told the jury to "disregard counsel's statement." Moreover, the trial court's general instruction during the jury charge on the defendant's right not to testify was insufficient to remove the prejudice because no reference was made to the offending argument, and the damage done by it remained unrepaired.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 23 June 1982 in Superior Court, DUPLIN County. Heard in the Court of Appeals 21 September 1983.

Defendant was convicted of second degree burglary and felonious larceny on 23 June 1982 and was sentenced to consecutive prison terms of twenty-five and three years, respectively.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defenders Marc Towler and James H. Gold, for the defendant.

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BECTON, Judge.

We are once again presented with the issue of a prosecutor commenting during final argument upon the defendant's failure to testify. The private prosecutor asked, as reconstructed for the record by the trial court: "Why in the world did the defendant sit here for these one-and-a-half days remaining mute and not come to the stand?"

The State concedes that the prosecutor's comment was improper, but argues that the comment was not prejudicial in view of the fact that the court sustained defendant's objection to the comment and immediately instructed the jury to disregard it. We do not believe that the trial court's instruction to disregard the prosecutor's remark was sufficient to remove the taint, and thus we order a new trial.

We are aware of the United States Supreme Court's latest pronouncement in *United States v. Hasting*, --- U.S. ---, 76 L.Ed. 2d 96, 103 S.Ct. 1974 (1983), that a comment on an accused's failure to testify does not result in an automatic reversal and that courts should first determine whether the comment is harmless beyond a reasonable doubt. But the Supreme Court's interpretation of the federal constitution, whether broad or narrow, does not necessarily limit our courts in interpreting our constitution and statutory enactments.

Forty-two years before the United States Supreme Court held that a comment on a defendant's failure to take the stand violates the defendant's Fifth and Fourteenth Amendment rights to remain silent, *Griffin v. California*, 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229 (1965), North Carolina recognized that such an argument violated the 1919 version of N.C. Gen. Stat. § 8-54 (1981). *State v. Humphrey*, 186 N.C. 533, 120 S.E. 85 (1923); N.C. Consol. Stat. § 1799 (1919). See also *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975). The language of G.S. § 8-54, in its current version, remains unchanged. The statute provides:

In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. (Emphasis added.)

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Indeed, as early as 1881, the General Assembly expressed, in the N.C. Sess. Laws ch. 110 § 2, the underlying policy of G.S. § 8-54 in substantially similar language.

In the face of a long and uniform history of forbidding prosecutorial comment on the failure of a person charged with a crime to testify, our Supreme Court, in the 1950's, engrafted an exception onto the iron-clad rule by looking to see if the trial court had taken the necessary action to minimize the prejudice resulting from improper statements on the defendant's failure to testify. See *State v. Lewis*, 256 N.C. 430, 124 S.E. 2d 115 (1962). Now, the applicable law in North Carolina is this: When a prosecutor improperly comments upon the accused's failure to testify, the error may be cured if the trial court (1) sustains an objection to the comment; (2) tells the jury that the comment was improper; and (3) instructs the jury to disregard the comment and not to consider the failure of the accused to offer himself as a witness. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. McCall*. Consequently, it has been held that an instruction by the trial court immediately after sustaining an objection to a prosecutor's comment on the defendant's failure to testify, that the defendant's exercise of his right not to testify shall not be used against him, is insufficient absent an instruction that the argument was improper and that it should be disregarded. *State v. Jones*, 19 N.C. App. 395, 198 S.E. 2d 744 (1973).

In the case before us, the trial court did not instruct the jury that the comment was improper or why it was improper; it only told the jury to "disregard counsel's statement." Moreover, the trial court's general instruction during the jury charge on the defendant's right not to testify was insufficient to remove the prejudice because no reference was made to the offending argument, and the damage done by it remained unrepaired. See *State v. Monk*. To be effective, the trial court's instruction should immediately follow the offensive remark and should explain why the remark was improper. The fact that the remark was made by a private prosecutor makes no difference. See *State v. McCall*.

In addition to the trial court's failure properly to cure the error committed by the private prosecutor, there was a conflict in the State's evidence regarding whether the break-in occurred at night or during the day. This conflict is significant because it

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points out the difference between second-degree burglary and felonious breaking or entering. The mandatory minimum sentence for second-degree burglary is fourteen years; the presumptive sentence for felonious breaking or entering is only three years, a substantial difference. N.C. Gen. Stat. § 14-52 (1981); N.C. Gen. Stat. § 14-54 (1981); N.C. Gen. Stat. § 15A-1340.4(f)(6) (Supp. 1981). Consequently, we cannot say that the comment in this case was harmless error beyond a reasonable doubt. Sadly, neither can we say that the transgression was inadvertent.

An accused may choose not to take the stand for several reasons which are not consistent with guilt. An accused may be innocent of the crime charged, but may choose not to testify for fear of being impeached by a prior conviction. (As most defense attorneys and prosecutors know, once evidence of a prior conviction is admitted, the probability of a conviction in the case at trial is increased.) Further, the defendant may be inarticulate, uneducated, or nervous by nature. In short, he will make a poor witness for himself. And, sometimes the State simply has a weak case.

Yet, prosecutors persist in commenting upon the defendant's failure to testify—that issue has appeared repeatedly in the appellate reporters of North Carolina.¹ In case after case, the outcome on appeal has been dependent upon whether the trial court has taken the necessary action, upon a prompt objection, to

1. *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Lindsay*, 278 N.C. 293, 179 S.E. 2d 364 (1971); *State v. Clayton*, 272 N.C. 377, 158 S.E. 2d 557 (1968); *State v. Bumpers*, 270 N.C. 521, 155 S.E. 2d 173 (1967), *rev'd on other grounds*, 391 U.S. 543, 20 L.Ed. 2d 797, 88 S.Ct. 1788 (1968); *State v. Stephens*, 262 N.C. 45, 136 S.E. 2d 209 (1964); *State v. Lewis*, 256 N.C. 430, 124 S.E. 2d 115 (1962); *State v. Roberts*, 243 N.C. 619, 91 S.E. 2d 589 (1956); *State v. McLamb*, 235 N.C. 251, 69 S.E. 2d 537 (1952); *State v. Murphy*, 56 N.C. App. 771, 290 S.E. 2d 408, *aff'd*, 306 N.C. 734, 295 S.E. 2d 470 (1982); *State v. Hunnicutt*, 44 N.C. App. 531, 261 S.E. 2d 682, *disc. review denied*, 299 N.C. 739, 267 S.E. 2d 666 (1980). *State v. Soloman*, 40 N.C. App. 600, 253 S.E. 2d 270 (1979); *State v. Edwards*, 27 N.C. App. 369, 219 S.E. 2d 249 (1975); *State v. Jones*, 19 N.C. App. 395, 198 S.E. 2d 744 (1973); *State v. Waddell*, 11 N.C. App. 577, 181 S.E. 2d 737 (1971); *State v. Mitchell*, 6 N.C. App. 755, 171 S.E. 2d 74 (1969).

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minimize the prejudice resulting from the improper comment.² This is not the way it should be. The trial court should not be placed in the position of rescuing the State's case. The onus should be on the prosecutor, not on the trial court.

Simply put, prosecutors are not being effectively deterred from commenting upon the defendant's failure to take the stand. As the State expressly conceded in oral argument, requiring a new trial whenever a prosecutor comments on defendant's failure to testify may be the only way to stop the problem confronting us again today. Some observers have always questioned the effectiveness of curative instructions. They feel that once the improper words have been uttered, the damage has been indelibly done; that curative instructions are unrealistically expected to be magic wands which erase improper arguments from the jurors' minds. Or, as Justice Jackson once wrote in a concurring opinion, "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch v. United States*, 336 U.S. 440, 453, 93 L.Ed. 790, 799, 69 S.Ct. 716, 723 (1949).

And we know that prosecuting attorneys have a difficult job. But "[they] are in a very peculiar sense servants of the law. [Citation omitted.] They owe the duty to the State which they represent, the accused whom they prosecute, and the cause of justice which they serve to observe the rules of practice created by law to give those tried for crime the safeguards of a new trial." *State v. Phillips*, 240 N.C. 516, 522, 82 S.E. 2d 762, 766 (1954).

The public interests demand that a prosecution be conducted with energy and skill, but the prosecuting officer should see that no unfair advantage is taken of the accused. It is as much his duty to see that a person on trial is not

2. In most cases involving an improper comment, a conviction was upheld because the trial court took the necessary corrective measures or no objection had been interposed to the argument. See, e.g., *State v. Hopper*, *supra*; *State v. Lindsay*, *supra*; *State v. Clayton*, *supra*; *State v. Bumpers*, *supra*; *State v. Stephens*, *supra*; *State v. Lewis*, *supra*; *State v. Murphy*, *supra*; *State v. Hunnicutt*, *supra*; *State v. Edwards*, *supra*; and *State v. Mitchell*, *supra*. On the other hand, reversible error was found in the following cases because the trial court failed to take the necessary corrective action: *State v. Monk*, *supra*; *State v. McCall*, *supra*; *State v. Roberts*, *supra*; *State v. McLamb*, *supra*; *State v. Solomon*, *supra*; and *State v. Waddell*, *supra*.

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deprived of any of his statutory or constitutional rights as it is to prosecute him for the crime with which he may be charged.

State v. Britt, 288 N.C. 699, 710, 220 S.E. 2d 283, 290 (1975) (quoting 63 Am. Jur. 2d *Prosecuting Attorneys* § 27 (1972)). Our Supreme Court has stated: "Ministers of the law ought not to permit zeal for its enforcement to cause them to transgress its precepts. They should remember that where law ends, tyranny begins." *State v. Warren*, 235 N.C. 117, 119, 68 S.E. 2d 779, 780 (1952).

Because the trial court in this case failed to take the necessary action to minimize the obvious prejudice resulting from the prosecutor's improper comment on defendant's failure to testify, the judgment is vacated and the cause remanded for a

New trial.

Judges JOHNSON and BRASWELL concur.

APPALACHIAN POSTER ADVERTISING COMPANY, INC. v. THOMAS W. BRADSHAW, JR., AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA

No. 8210SC1215

(Filed 15 November 1983)

Highways and Cartways § 2.1— outdoor advertising sign—no substantial alteration

Petitioner's outdoor advertising sign was not altered substantially so as to permit the Secretary of Transportation to revoke petitioner's permit for the sign where the dimensions of the sign were changed but the square footage remained the same; the wording of the sign and the advertiser remained unchanged; the sign was raised 4-10 feet higher from the ground and an additional pole was added to the sign; the sign did not significantly increase in value; and the cost of the changes to the sign were less than 16% of the sign's initial value.

APPEAL by respondent from *Farmer, Judge*. Judgment entered 1 July 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 18 October 1983.

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Respondent appeals from judgment of superior court which reversed his administrative decision revoking petitioner's sign permit.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for respondent appellant.

Bailey, Dixon, Wooten, McDonald & Fountain, by Kenneth Wooten, Jr. and Gary S. Parsons, for petitioner appellee.

BECTON, Judge.

I

The dispositive issue on appeal is whether the superior court erred in concluding that alterations made to a sign were not substantial. For the reasons that follow, we hold that the superior court did not err.

II

On 30 January 1980, the district engineer of the North Carolina Department of Transportation in Iredell County wrote petitioner, Appalachian Poster Advertising Company, Inc., a letter advising it that its sign Permit No. I-0040-82054 had been revoked by reason of the rebuilding or alteration of the sign. Petitioner appealed from the decision of the district engineer to respondent, the Secretary of Transportation at that time. Respondent, by letter dated 9 May 1980, affirmed the decision of the district engineer, finding (a) that the dimensions of the sign had changed from 25' x 12' to 30' by 10', (b) that the height of the poles had increased from 20 feet to 30 feet, and (c) that the number of poles had increased from three to four, and concluding that the alterations caused the sign to be "other than substantially the same as it was on the date of issuance of a valid permit." The permit, therefore, was revoked pursuant to 19A N.C. Admin. Code § 2E.0210(6) (1983).

Petitioner, pursuant to N.C. Gen. Stat. § 136-134.1 (1981), appealed the Secretary's decision to the Wake County Superior Court. The pleadings, stipulations, administrative record and testimony presented at that *de novo* hearing showed the following:

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Petitioner had been requested by the owner of the land upon which the sign was located to move the sign "an appropriate amount" because the United States Environmental Protection Agency had advised the landowner that one of the poles of petitioner's sign could not legally be embedded in the earth fill for a dam which the landowner was constructing. Without contacting the Department of Transportation for permission to move or alter the sign, petitioner moved the sign structure away from the dam fill by shifting a back pole forward. With the addition of a fourth pole, the sign was moved closer to the highway, but still remained 15 feet away from the highway right-of-way fence. At the request of the landowner, who wanted to be able to mow underneath it, the sign was raised four to ten feet higher from the ground than the original sign. The dimensions of the sign were also changed, but the square footage remained the same. In the past, permission to alter the dimensions while maintaining the same total area had been granted routinely. The wording of the sign remained the same, though arranged differently.

The superior court, based upon the foregoing evidence, made findings of fact to which no exception has been taken. After finding that the Secretary's decision was based upon certain changes which had been made to the sign, the court also found that the copy or wording on the face of the sign was not changed, although it had been rearranged; and that the advertiser remained the same. The value of the sign before the changes was between \$3,700 and \$3,800; the value after the change was between \$4,100 and \$4,200. The cost of the changes to the sign was around \$500.00, which was less than sixteen percent (16%) of the sign's initial value. The superior court concluded that the changes to the sign were not substantial; that the permit should not have been revoked; and that the revocation of petitioner's permit based upon these insubstantial changes was contrary to law and the Department of Transportation's regulations. It ordered the Department of Transportation to reinstate petitioner's sign permit.

III

Respondent first contends that petitioner failed to carry its burden under G.S. § 136-134.1 of showing that the Secretary's decision was (a) in violation of constitutional provisions; or (b) not

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made in accordance with N.C. Gen. Stat. ch. 136, art. 11 (1981) and the rules and regulations promulgated by the Department of Transportation; or (c) affected by other error of law. Respondent suggests that since the evidence and facts found at both hearings were basically the same, the superior court erred in reversing the decision of the Secretary.

This contention is without merit. While an interpretation of a statute or rule of an agency administering it is to be accorded some deference, respondent's argument gives it inordinate deference. G.S. § 136-134.1 provides that the superior court's review of the Secretary's decision is *de novo*. The superior court is thus not bound by the Secretary's findings of fact and conclusions of law. The superior court may arrive at a different conclusion of law based upon the same evidence. Acceptance of respondent's argument would render review meaningless, as the Secretary's decision would always be upheld, regardless of the court's differing interpretation of the evidence or administrative rule. Nevertheless, petitioner made an additional showing, as apparent from the superior court's findings of fact, that the wording of the sign and the advertiser remained unchanged and that the sign had not significantly increased in value.

The rule or regulation upon which the revocation of petitioner's sign permit was based provides:

Any valid permit issued for a lawful outdoor advertising structure shall be revoked by the appropriate district engineer for any one of the following reasons:

. . . .

(6) any alteration of a nonconforming sign or a sign conforming by virtue of the grandfather clause which would cause it to be *other than substantially the same* as it was on the date of issuance of a valid permit; examples of alterations which are not allowed for nonconforming signs or signs conforming by virtue of the grandfather clause include: extension, enlargement, replacement, rebuilding, re-erecting or addition of illumination. . . .

19A N.C. Admin. Code § 2E.0210(6) (1983) (emphasis added). This rule became effective on 1 July 1978. To answer the question

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whether petitioner's alterations to the sign caused it to be "other than substantially the same as it was on the date of issuance of a valid permit," we must interpret the word "substantially." The term "substantially" has been defined in two North Carolina decisions as "essentially, in the main, or for the most part," *North Carolina National Bank v. Burnette*, 297 N.C. 524, 532, 256 S.E. 2d 388, 393 (1979), and as "'[i]n a substantial manner, in substance, essentially.'" It does not mean an accurate or exact copy." *Douglas v. Rhodes*, 188 N.C. 580, 583, 125 S.E. 261, 262 (1924) (quoting Webster's Dictionary).

Guided by these definitions, we accept the trial court's conclusion that the alterations were not substantial. Despite the changes which were made, the sign, although not "an accurate or exact copy," was "essentially, in the main, or for the most part" the same as it was before. After the changes, the sign bore the same message, for the same advertiser, over the same square footage and at the same location. Although the dimensions of the sign were changed, the square footage remained the same. The evidence showed that changes in the dimensions of signs while retaining the same square footage had been routinely allowed in the past by the Respondent. Furthermore, the cost of the changes to the sign, which the court found to be less than sixteen percent (16%) of the sign's initial value, was well within the fifty percent ceiling of 19A N.C. Admin. Code § 2E.0210(13) (1983), which provides for the revocation of outdoor advertising permits for "[m]aking repairs . . . which exceed fifty percent of the initial value of the sign as determined by the district engineer."

IV

Based upon the foregoing, we conclude that the superior court's conclusion that the changes in the sign were not substantial was supported by the evidence and its findings of fact. The judgment of the superior court is

Affirmed.

Judges HEDRICK and EAGLES concur.

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STATE OF NORTH CAROLINA v. THOMAS VICTOR TIORAN

No. 8321SC147

(Filed 15 November 1983)

Automobiles and Other Vehicles § 114— failure to instruct on intervening negligence—error

In a prosecution in which defendant was convicted of two counts of death by vehicle, the trial court erred in failing to instruct on the intervening negligence of another as a defense where the theory of defendant's defense was that the negligence of another intervened between defendant's negligence and the fatal collision, so as to insulate defendant's negligence and since there was evidence to support defendant's theory.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered in FORSYTH County Superior Court 24 September 1982. Heard in the Court of Appeals 19 October 1983.

Defendant was convicted of two counts of death by vehicle. The evidence for the state tended to show the following events and circumstances. On 25 June 1982, at about 4:45 p.m., William Merryman was driving his Oldsmobile in an easterly direction on Interstate Highway 40, east of Winston-Salem, approaching the intersection of the Linville Road bridge. At that place, I-40 has two lanes for traffic moving east. Merryman was in the right-hand lane. When Merryman reached a point about 100 feet from the bridge, a truck, driven by defendant, moved from a parked position on the shoulder of the highway into Merryman's lane of travel. Merryman's speed was between fifty and fifty-five miles per hour. Without looking to his left or to his rear, Merryman swerved his car partly into the left-hand lane. Almost instantly, he observed a brown Datsun passing him on the left, its left wheels on the dirt shoulder of the road. Merryman swerved back to the right, the Datsun passed him, hit defendant's truck a glancing blow, went out of control and crossed the median into the west-bound traffic lanes, where it was struck by a large truck. The two persons in the Datsun were killed. Merryman pulled in behind defendant's truck and both vehicles stopped. Investigating officers noticed the odor of alcohol on defendant's breath and other signs of possible intoxication. A breathalyzer test administered about two hours later showed defendant to have a blood alcohol level of .11 per cent.

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Defendant's evidence tended to show that defendant parked his truck on the shoulder of the road to investigate a noise in the rear of the truck. Defendant had consumed two cans of beer but was not intoxicated. As defendant prepared to resume his journey, he turned on his left turn signal, looked to his rear, allowed three cars to pass, observed Merryman's car about 400 feet behind him traveling in the right-hand lane. As defendant entered the highway, Merryman began to change lanes. The Datsun then appeared, Merryman pulled back in behind defendant, the Datsun passed Merryman's car, hit the side of defendant's truck, went out of control and crossed the median. Merryman's car never came closer than fifty feet to defendant's truck. Before swerving to his left, Merryman did not look to his rear or to his left. When he first swerved to his left, he may have applied his brakes to some degree, but not forcefully, and Merryman did not reduce his speed upon observing defendant's truck entering the highway nor before turning his car into the left-hand lane of travel.

From judgment entered on the verdicts, defendant has appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Philip A. Telfer, for the State.

Drum and Lefkowitz, by Victor M. Lefkowitz, for defendant.

WELLS, Judge.

The principal question we decide in this appeal is whether a defendant charged with death by vehicle under G.S. § 20-141.4¹ may assert the intervening negligence of another as a defense. We answer that question in the affirmative and order a new trial.

1. § 20-141.4. Death by vehicle.—(a) Whoever shall unintentionally cause the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of death by vehicle when such violation is the proximate cause of said death. (b) A violation of this section shall constitute a misdemeanor, punishable by a fine of not more than five hundred dollars (\$500.00) or imprisonment for not more than two years, or both, in the discretion of the court. (c) No person who has been placed in jeopardy upon a charge of death by vehicle shall subsequently be prosecuted for the offense of manslaughter arising out of the same death; and no person who has been placed in jeopardy upon a charge of manslaughter shall subsequently be prosecuted for death by vehicle arising out of the same death.

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In the case now before us, defendant requested the trial court to instruct the jury on intervening negligence. His request was refused. Defendant contends that the theory of his defense was that the negligence of William Merryman intervened between defendant's negligence and the fatal collision, so as to insulate defendant's negligence. In support of his argument, defendant cites and relies upon *State v. Harrington*, 260 N.C. 663, 133 S.E. 2d 452 (1963).

In *Harrington*, the defendant was charged with manslaughter growing out of the negligent operation of his automobile, resulting in the deaths of two children. The theory defendant asserted at trial was that the deaths of the two children were proximately caused by the negligence of the driver of another automobile or by the contributory negligence of the victims. At trial, defendant requested the trial court to charge the jury as to the duty of the victims to yield the right-of-way to defendant, pursuant to G.S. § 20-174(d). The supreme court, in holding that it was error for the trial court to refuse the charge, said:

Contributory negligence is no defense in a criminal action. However, in a case in which defendant is charged with manslaughter by reason of his alleged culpable negligence, the negligence of the person fatally injured, or of a third person, is relevant and material on the question of proximate cause. . . . It is true that the deceased boys were only 7 and 10 years of age. As a matter of law, a child under 7 years of age is incapable of negligence. An infant between the ages of 7 and 14 is presumed incapable of negligence, but the presumption is rebuttable. . . . These are rules of law by which it is determined in civil cases whether the suit by an infant for negligent injury is barred by his contributory negligence. In a criminal action based on culpable negligence the presumption of incapability of negligence by an infant between the ages of 7 and 14 does not shift the burden of proof to, or cast any burden upon, defendant. The inquiry is whether the culpable conduct, if any, of defendant was a proximate cause of the death. If under all the circumstances the conduct of the infant was such as to create in the minds of the jury a reasonable doubt that the acts of defendant constituted a proximate cause of death, defendant should be acquitted.

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The defendant is entitled to have the jury consider, on the question of proximate cause, whether the conduct of the driver of the vehicle he attempted to pass, or the conduct of the infants in violating G.S. 20-174(d), or both together, was the proximate cause of the death of the infants. There is no conflict in the evidence relative to the conduct of the infants or of the driver of the other car—and if there were conflicting evidence, the rule would be the same. The contention of defendant that death was proximately caused by such conduct is, perhaps, his strongest line of defense. The charge of the court does not touch upon these matters in any respect. The jury must not only consider the case in accordance with the State's theory of the occurrence but also in accordance with the defendant's theory. . . . Defendant in apt time requested that the law bearing upon his theory of the case be presented to the jury. He was merely asking the court to charge the law arising on the evidence. . . . Justice and the law countenance nothing less. [Citations omitted.]

The foregoing rules applied by the court in *Harrington* are consistent with the rules in civil actions for negligent injury to the effect that where the negligence of one or more persons combines or concurs in causing injury to another, the question of whether the intervening negligence of another tort-feasor will operate to insulate the negligence of the original tort-feasor is ordinarily a question for the jury. See *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E. 2d 241 (1960), and cases cited and discussed therein; *Davis v. Jessup and Carroll v. Jessup*, 257 N.C. 215, 125 S.E. 2d 440 (1962); and *Hester v. Miller*, 41 N.C. App. 509, 255 S.E. 2d 318, *disc. rev. denied*, 298 N.C. 296, 259 S.E. 2d 913 (1979).

There was evidence in the trial tending to show that William Merryman's negligence followed defendant's negligence. Under such circumstances, it was for the jury to determine whether Merryman's negligence was such as to break the causal connection between defendant's negligence and thus become the proximate cause of the victim's death, and defendant was entitled to have the jury so instructed.

In another assignment of error, defendant contends that the trial court erred in denying his motion to dismiss the charge of involuntary manslaughter, for lack of evidence of culpable negli-

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gence by defendant. The jury's verdict having exonerated defendant of the manslaughter charge, he shows no prejudice in this assignment of error. *See State v. Elkerson*, 304 N.C. 658, 285 S.E. 2d 784 (1982).

For the reasons stated, there must be a

New trial.

Chief Judge VAUGHN and Judge JOHNSON concur.

SOUTHLAND ASSOCIATES REALTORS, INC. v. ALAN N. MINER AND AMY J. ELDRIDGE

No. 8210SC1221

(Filed 15 November 1983)

Brokers and Factors § 6— right to real estate commission—issue for jury

A genuine issue of material fact for the jury was presented as to whether plaintiff real estate broker secured a purchaser ready, willing and able to buy defendants' property on defendants' terms so as to entitle plaintiff to a commission where the evidence showed that the contract between the parties gave plaintiff the exclusive right to sell the property at a price of \$134,900.00 but fixed no terms of the sale; plaintiff presented evidence that it obtained an offer to purchase from two prospective purchasers who agreed to pay a portion of the price with a promissory note secured by a purchase money deed of trust, that this offer to purchase was signed by the male defendant, that the female defendant verbally agreed to these terms, that the prospective purchaser submitted a second offer to purchase in which they agreed to pay the asking price by assuming defendants' mortgage and paying the balance in cash, and that defendants then stated that they did not wish to sell their property; defendants in their answer denied that the first offer to purchase was ever submitted to them; and there was no evidence that defendants' mortgage was assumable or that defendants would have agreed to the assumption. Therefore, the trial court erred in entering summary judgment for the plaintiff.

APPEAL by defendants from *Farmer, Judge*. Judgment entered 25 June 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 18 October 1983.

This is a civil action in which plaintiff, a real estate broker, seeks to recover a commission for having procured a purchaser

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for defendants' property. The trial court granted summary judgment in plaintiff's favor, and defendants appealed.

After examining the pleadings, affidavits and admissions, we conclude that there was an unresolved issue of material fact and reverse the summary judgment in plaintiff's favor.

Gary S. Lawrence, for plaintiff appellee.

Law Offices of Robert A. Hassell, by R. U. Sturtevant, for defendant appellants.

ARNOLD, Judge.

On 4 November 1981 defendants entered into a contract giving plaintiff the exclusive right to sell their property for a period of 90 days at the asking price of \$134,900. Plaintiff was to receive a 6% commission "upon the sale or exchange of said property . . . upon the terms hereinafter mentioned, or upon any other terms mutually agreeable." No terms are listed in this contract.

On 8 January 1982 plaintiff filed a complaint against defendants alleging that on 8 November 1981 it obtained an offer to purchase and contract from Louis and Priscilla Coleman. The Colemans expressly agreed to pay a portion of the asking price with a promissory note secured by a purchase money deed of trust. Monthly payments on the note were to be at the rate of 12.5%. This offer to purchase and contract further shows that it was signed by defendant Alan N. Miner on 14 November 1981. Plaintiff alleged that defendant Amy Eldridge verbally agreed to these terms. Plaintiff further alleged that on 7 January 1982 the Colemans submitted a second offer to purchase defendants' property. Under the terms of this offer the Colemans agreed to pay the asking price by paying \$1,500 in earnest money, assuming defendants' existing mortgage at 12.5% and paying the balance in cash. Defendants allegedly refused to sign this offer, and stated they did not wish to sell their property. Plaintiff alleged that it had secured a purchaser, ready, willing and able to buy defendants' property for the asking price; and that defendants are indebted to it for a commission of \$8,094.

In their answer, defendants denied that the first offer to purchase was submitted to them. They admitted submission of the

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second offer but denied that plaintiff ever secured purchasers who were ready, willing and able to purchase the defendants' property for the asking price.

Plaintiff moved for summary judgment on 15 April 1982 and filed supporting affidavits of its manager, the realtor who allegedly procured the offers to purchase and the Colemans. The averments in these affidavits indicate that after defendants were informed of the 14 November 1981 offer to purchase, defendant Eldridge advised plaintiff's manager that she did not wish to sell the house; that Eldridge subsequently agreed to sign the offer to purchase if the closing date was delayed; that the Colemans agreed to this delay and that Eldridge again indicated that she did not intend to go through with the sale. Evidence in these affidavits further indicate that the Colemans paid \$1,500 as earnest money on 8 November 1981; that in preparation of the purchase they made certain financial and closing arrangements and that up to and including the date the complaint was filed they have been ready, willing and able to purchase the property for the asking price.

The defendants presented no affidavits in response to plaintiff's motion for summary judgment.

Defendants argue that there existed an issue of material fact as to whether plaintiff had produced a purchaser ready, able and willing to purchase defendants' property on defendants' terms. Upon examination of the facts and pertinent law, we agree.

The law in North Carolina allows a broker to recover a commission only if he has found a prospect, ready, able and willing to purchase in accordance with the conditions imposed in the broker's contract. *Sparks v. Purser*, 258 N.C. 55, 127 S.E. 2d 765 (1962). "[A]bsent a provision respecting the time of payment, a contract for the sale of realty will be construed as requiring payment in cash simultaneously with the tender or delivery of the deed." *Kidd v. Early*, 289 N.C. 343, 358, 222 S.E. 2d 392, 403 (1976). The North Carolina Courts have further indicated that if the owner of property never gives the broker the details of the terms in the agreement to sell, then the broker is precluded from producing a buyer ready, able and willing to purchase on terms fixed by the owner. See *Thompson-McLean, Inc. v. Campbell*, 261 N.C. 310, 134 S.E. 2d 671 (1964). The North Carolina Supreme

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Court found that Thompson-McLean, Inc., a realtor, either had no binding contract because the terms of the selling agreement were not finally fixed or, if they were, no purchaser willing to comply with these terms was procured. The Court cited the following language as support:

"Where the listing agreement fails to fix the terms for the sale or exchange of property, or specifies only part of the terms with the understanding that further details are subject to negotiation between the principal and the customer, the principal has been held free to terminate the negotiations without liability to the broker. Moreover, in such a case the broker may be denied compensation unless he produced a customer ready, able, and willing to buy on such terms as the principal may require, or as he accepts, or unless the principal and the customer reach a definitive oral or written agreement." (12 Am. Jur. 2d, Brokers § 187.)

Id. at 315, 134 S.E. 2d at 676 (1964).

In the case on appeal, the only term expressed in the contract between plaintiff and defendants is the cash price. There is no evidence that the Colemans ever made an offer to pay cash for the property, but instead sought to assume defendants' mortgage. There is no evidence that this mortgage was assumable or that defendants would have even agreed to an assumption. As a result there is insufficient evidence that the Colemans were either financially able to purchase the property or able to purchase the property under terms agreed to by the sellers. Furthermore, since the terms of the sale appear never to have been fixed, there was no binding contract between the parties and defendants could freely terminate the negotiations without liability to plaintiff.

Plaintiff has cited the following rule in *Bonn v. Summers*, 249 N.C. 357, 106 S.E. 2d 470 (1959), as support for its argument that summary judgment was properly allowed in its favor: "It seems to be settled law that where a broker acts within the terms and authority given, and succeeds in procuring a contract of sale with a responsible purchaser, he is entitled to his stipulated commission and his claim therefor is not affected because the vendors voluntarily fail to comply with their agreement to sell. (Citations omitted)." *Id.* at 359, 106 S.E. 2d at 471. The plaintiff broker in *Bonn* had sought recovery of his commission, and a directed ver-

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dict had been entered in the landowners' favor. The Supreme Court reversed and ordered the case submitted to the jury. The Court, however, emphasized that the owners were not contending that the broker failed to procure a bona fide purchaser, who was ready, willing and able to purchase the owners' property.

Plaintiff also argues that since defendant Miner, as owner of a one-half undivided interest in the property, signed the Colemans' first offer to purchase, summary judgment against Miner was proper. We disagree. An issue as to whether Miner ever signed the first offer to purchase was raised in his attorney's response to plaintiff's request for admissions. Miner's attorney specifically denied that Miner was shown this offer to purchase or that he signed it. We find it worth noting that under the present G.S. 1A-1, Rule 36 (1977 Cum. Supp.), a sworn answer to a request for admission is no longer necessary. The rule only requires that the response be signed by the party or his counsel. Genuine issues of fact regarding defendant Miner's liability were therefore raised.

We conclude that the pleadings, admissions on file, together with the affidavits, show that plaintiff did not satisfy its burden of showing there was no genuine issue of fact in controversy. Summary judgment for plaintiff is therefore

Reversed.

Judges HILL and BRASWELL concur.

STATE OF NORTH CAROLINA v. OSCAR REGINALD HINNANT

No. 827SC1174

(Filed 15 November 1983)

1. Criminal Law § 138— public policy aspects of Fair Sentencing Act—great discretion in trial judge

Trial judges continue to have great discretion with respect to balancing factors found in aggravation against factors found in mitigation, and their balancing process, if correctly carried out, will not be disturbed on appeal. Therefore, defendant's argument that an appellate court may review the trial court's sentence on the grounds that one "weak" factor in aggravation should

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not be allowed to support a sentence which is double that of the presumptive sentence is rejected.

2. Criminal Law § 138— factors in mitigation—properly not submitted

The trial judge did not err in failing to find as mitigating factors that defendant was coerced into shooting the victim and that defendant was suffering from a mental condition (intoxication) which significantly reduced defendant's culpability since defendant's testimony that he was "coerced" into shooting the victim, while uncontradicted, was open to question because of the subjective nature of such evidence and because the evidence tended to show that defendant was not in such a state of intoxication as would have deprived him of his reason or of his ability to understand the dangerous aspects of his conduct.

APPEAL by defendant from *Brown, Judge*. Judgment entered 21 June 1982 in NASH County Superior Court. Heard in the Court of Appeals 30 August 1983.

Defendant pleaded guilty to second degree murder, having confessed to shooting Ernest Lee Blanks. In his statement, defendant admitted pulling the trigger of a shotgun which another person pointed at the head of the victim. Defendant claimed he was drunk at the time, that he could not see the victim, and that the other person coaxed him into pulling the trigger. He helped dispose of the body after the killing.

At the sentencing hearing, the trial court found as the sole factor in aggravation that defendant had prior convictions for crimes punishable by more than sixty days' confinement. The trial court found in mitigation that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process, and that he was willing to testify against a co-defendant.¹ The trial court decided the aggravating factor outweighed the mitigating factors and sentenced defendant to thirty years in prison. The presumptive sentence for second degree murder is fifteen years. G.S. § 15A-1340.4(f)(1). Defendant appealed his sentence pursuant to G.S. § 15A-1444(a1).

1. Evidence that a defendant "testified truthfully" against a co-defendant is one statutory factor which a trial judge must consider in passing sentence under the Fair Sentencing Act, G.S. § 15A-1340.4(a)(2)(h). However, evidence that a defendant was merely "willing" to testify against a co-defendant does not meet the statutory requirement. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Nevertheless, a trial judge may properly consider *nonstatutory* mitigating factors in setting a sentence, so long as those factors are logically related to the purposes of

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Attorney General Rufus L. Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Evans and Rountree, by Don Evans, for defendant.

WELLS, Judge.

Defendant challenges the trial court's application of the Fair Sentencing Act to the facts of his case. Specifically, he first contends that his sentence undermines the policy of the act because he received double the presumptive prison term on the basis of a single weak aggravating factor: prior convictions of (1) shoplifting and (2) breaking and entering and larceny.

[1] This court and our supreme court have previously considered the public policy aspects of the Fair Sentencing Act raised by the defendant in this case. In *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, cert. denied, 306 N.C. 745, 295 S.E. 2d 482 (1982), we made it clear that under the act, trial judges continue to have great discretion with respect to balancing factors found in aggravation against factors found in mitigation, and that their balancing process, if correctly carried out, will not be disturbed on appeal. In *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), our supreme court approved those principles we laid down in *Davis*. We must, therefore, reject defendant's argument that we may review the trial court's sentence on the grounds that one "weak" factor in aggravation should not be allowed to support a sentence which is double that of the presumptive sentence.

While rejecting defendant's argument, we are constrained, however, to recognize defendant's lament that this case significantly illustrates the fact that the evil of disparity in sentencing has not been eliminated by the act. There is no question that within the parameters of *Davis* and *Ahearn*, a single factor in ag-

sentencing. G.S. § 15A-1340.4. The crucial difference is that a trial judge *must* consider the presence or absence of the statutory mitigating and aggravating factors; whereas a trial judge *may*, but is not required to consider *nonstatutory* mitigating factors. *State v. Jones*, *supra*. In the case at bar, the record merely shows that the trial judge considered as a mitigating factor that defendant was willing to testify against a co-defendant. It is not clear whether the trial court believed this evidence met the statutory requirements of G.S. § 15A-1340.4(a)(2)(h), or indicated a nonstatutory mitigating factor. In either case, of course, no prejudice to defendant can have resulted from the judge's finding.

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gravation, properly found, may support a sentence ranging from fifteen years (the presumptive sentence) to life imprisonment (the maximum sentence) for second degree murder, regardless of how many factors in mitigation are found.

Neither can we find necessary fault with defendant's argument that if the fundamental goals of the act are to be obtained, deviation from presumptive sentences should be the exception, not the rule, and that this case may illustrate the fears of the Knox Commission² that "if trial judges . . . disregard legislatively prescribed guidelines for sentencing, then the system would quickly revert to the unjust results of the present discretionary system." Whatever the merits of such argument may be, we are nevertheless convinced that as the act is now written, the results reached by us in *Davis*—and blessed by our supreme court in *Ahearn*—are sound. The act did not eliminate the existing "discretionary system"; it only established certain guidelines for trial judges which, if correctly observed, still leaves an open door for disparity of sentences. When it comes to sentencing, the trial judges still sit in the driver's seat. While, when appropriate, we can apply the letter of the law, the spirit of the law reposes in the hands of the trial judges who must apply it. In sentencing review, we look not for errors in judgment, but only for errors of law.

[2] Defendant also argues that the trial court did commit an error of law by not finding two factors in mitigation: first, that defendant was coerced into shooting the victim, and second, that defendant was suffering from a mental condition (alcoholism and drunkenness) which, while insufficient to constitute a defense, did significantly reduce defendant's culpability.

Initially, defendant argues that his evidence on both factors was "uncontradicted" and was therefore of a quality sufficient to require a finding in mitigation. We cannot agree. The defendant has the burden of establishing such factors by a preponderance of the evidence, G.S. § 15A-1340.4(a), and the trial court must weigh

2. The Commission on Correctional Programs, informally known as the Knox Commission, was created by a legislative act in 1974. The Commission's sentencing study, "Final Report of the Legislative Commission on Correctional Programs," was presented to the North Carolina General Assembly in February, 1977. Copies of the report are available at the North Carolina Legislative Library, Legislative Building, Jones Street, Raleigh, N.C.

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defendant's evidence regardless of whether it is uncontradicted. The test laid down by our supreme court in *State v. Jones, supra*, is as follows:

When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act.

While defendant's testimony that he was "coerced" into shooting the victim may be uncontradicted, its credibility is certainly open to question because of the subjective nature of such evidence and because of the defendant's interest in mitigating his own sentence. The same may be said for defendant's testimony that he was intoxicated at the time. Defendant's statement to the arresting officers indicates that he was able to recall in very substantial detail the events leading up to and following the shooting. Such evidence tends to show that defendant was not in such a state of intoxication as would have deprived him of his reason or of his ability to understand the dangerous aspects of his conduct; thus the credibility of such evidence was open to question.

For the reasons stated, the sentence imposed by the trial court is

Affirmed.

Judges ARNOLD and EAGLES concur.

WADE BAILEY, EMPLOYEE-PLAINTIFF v. SMOKY MOUNTAIN ENTERPRISES, INC., EMPLOYER-DEFENDANT AND SHELBY MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8210IC1248

(Filed 15 November 1983)

Master and Servant §§ 68.4, 72— workers' compensation—award for disability to back—prior award for similar injury—no double recovery

The Industrial Commission did not permit a double recovery in violation of G.S. 97-33 or G.S. 97-35 in awarding plaintiff compensation for a 20% perma-

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ment partial disability from ruptured discs in his back after previously compensating plaintiff for a 15% permanent partial disability to his back for a similar injury where the Commission found upon supporting evidence that plaintiff suffered a 20% permanent partial disability to his back as a result of the second injury, that the second injury was not an aggravation of the first but was a separate injury to a different portion of the back, and that plaintiff would have sustained the 20% disability from the second injury even if the earlier disability had not existed.

APPEAL by defendant from the opinion and award of the North Carolina Industrial Commission. Award entered 30 July 1982. Heard in the Court of Appeals 20 October 1983.

Plaintiff, an employee of defendant Smoky Mountain Enterprises, Inc., a manufacturer of Buck Stoves, sustained an injury to his back 15 May 1980 while working for defendant. He underwent a total of three operations to repair ruptured discs. On 26 July 1982, the Full Industrial Commission affirmed the decision of Deputy Commissioner Lisa Shepherd to award plaintiff compensation for a 20% permanent partial disability of the back.

Plaintiff had previously suffered a similar back injury while employed by Smoky Mountain Enterprises in 1979. As a result of that injury he underwent surgery. He was subsequently assigned a permanent partial disability rating of 15% and paid compensation.

Dr. Lary A. Schulhof, a neurological surgeon who treated plaintiff for both injuries, testified at trial. He stated, over defense counsel's objection, that there is an increased likelihood of having a ruptured disc after having previously ruptured a disc at the next level above or below, because an operation on one level reduces the amount of movement available at the next level up and places increased stress on that level. Dr. Schulhof further testified that, even had plaintiff not undergone the first operation, his opinion that plaintiff had a disability rating of 20% would not be changed.

With regard to a letter from Dr. Schulhof to defense counsel dated 16 July 1981 in which Dr. Schulhof wrote, "It would seem that if he (plaintiff) carried a 15% disability previously and now carries a 20% disability rating, due to recent events, then I would perhaps logically arrive at a 5% figure for the difference," Dr. Schulhof testified that he now found it difficult to form an opinion

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as to how the disability rating should be assigned. He later testified that a letter written by him to plaintiff's counsel dated 26 May 1981, in which he stated that plaintiff's 20% disability rating would be the same "even considering previous problems" now represented his current opinion.

Brock, Begley and Drye, by Michael W. Drye, for plaintiff-appellee.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Martha W. Surles, for defendant-appellants.

ARNOLD, Judge.

Defendants contend that the Full Commission's decision awarding plaintiff compensation for a 20% disability stemming from his second back injury after having previously compensated plaintiff for a 15% rating for a similar injury amounts to a double recovery. It is alleged that the most plaintiff is entitled to is compensation for a 5% permanent partial disability of his back, that figure representing the difference between the initial 15% rating and the subsequent 20% rating.

Defendants first contend that there was insufficient evidence to support the Commission's award of compensation for plaintiff's second injury. When reviewing an appeal from an award of the Full Commission this Court does not retry the facts, but, instead, determines whether there was any competent evidence before the Commission to support its findings of fact. *Inscoc v. DeRose Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977). In fact, the findings of the Commission are conclusive on appeal when supported by competent evidence, even though there may be evidence to support a contrary finding of fact. *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981).

The Commission's findings of fact in the instant case that "[t]he injury plaintiff sustained in May 1980 was not an aggravation of his previous injury, but was a separate injury to a different portion of the back"; that "[a]s a result of the compensable injury sustained in May 1980, plaintiff suffers a 20 percent permanent partial disability to his back"; and that "[p]laintiff would have sustained this same degree of disability from this accident if the earlier disability had not existed" are supported by competent evidence and are, therefore, binding on appeal.

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All of the evidence concerning plaintiff's disability comes from the testimony and letters of Dr. Schulhof. Although there does appear to be slight contradictions in the doctor's testimony, that testimony, when taken as a whole, constitutes competent evidence to support the Commission's findings of fact. It is evident from the record that Dr. Schulhof was at first hesitant to assign *any* disability rating, since he felt that decision was "an administrative decision rather than a medical decision." When considered in its entirety, however, his testimony clearly indicates his opinion that plaintiff did suffer two distinct injuries to his back, with the second injury requiring a 20% permanent partial disability rating in and of itself and without regard to the first injury. We find that there was sufficient evidence to support the Commission's findings of fact.

Defendants next contend that the Commission erred in relying in part on G.S. 97-33 in that it does not allow a plaintiff to be compensated for a 20% disability of the back when he has previously been compensated by the same employer for a 15% disability due to a prior injury. We disagree. That statute provides:

If any employee is an epileptic, or has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident . . . he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.

Defendants cite the case of *Schrum v. Catawba Upholstering Co.*, 214 N.C. 353, 199 S.E. 385 (1938), in which the court made the following interpretation of the statute which is now G.S. 97-33:

An analysis of this Section . . . clearly indicates that it was the intention of the Legislature to provide for the deduction of prior compensable injuries and thus to prevent double compensation. Where there are two compensable permanent injuries, in determining the degree of impairment caused by the second injury, the degree of the injury caused by the first must be deducted from the total injury resulting from

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the two accidents to determine the compensable injury caused by the second accident.

214 N.C. at 355, 199 S.E. at 387.

In relying on this language to contend that G.S. 97-33 only entitles plaintiff to some lesser amount of compensation, defendants ignore the Commission's finding that the injury suffered on 15 May 1980 is separate and distinct from the first injury, and, thus, in and of itself a basis for awarding plaintiff compensation for a full 20% disability rating.

Finally, defendants make a similar argument about the Commission's reliance on G.S. 97-35, contending that it, too, prohibits plaintiff from being compensated for a full 20% disability. That statute provides in part:

If any employee receives a permanent injury as specified in G.S. 97-31 after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries

Defendants contend that the statute merely provides that an employee who receives two successive injuries in the same employment shall be compensated for both injuries and that it does not entitle an employee to double recovery. Again, we find that the Commission's award to plaintiff does not amount to a double recovery for the reasons stated above.

Affirmed.

Judges HILL and BRASWELL concur.

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SIBYLE DAVIS SMITH AND MOLLIE FAYE DAVIS GARNER v. L. L. SMITH,
EXECUTOR OF THE ESTATE OF PEARY DAVIS, ALMA SUTTON DAVIS AND
MARSHALL BRITT

No. 824SC1235

(Filed 15 November 1983)

Landlord and Tenant § 2; Rules of Civil Procedure § 56.7— failure to state amount of rent—lease void—summary judgment proper—consideration on appeal limited to materials before trial court

In an action to recover rents due under a lease agreement where the trial court granted summary judgment for defendants, the appellate court could not consider a statute which had not been brought to the trial court's attention since the appellate court's consideration is limited to the materials before the trial court. Further, the trial court properly granted summary judgment for defendants since the lease under which plaintiffs' action was brought failed to state the amount of rent, and the amount of rent is an essential term of a lease under the law of contracts. A lease which leaves the amount of rent open for future agreement is void for indefiniteness.

APPEAL by plaintiff from *Brown, Judge*. Judgments entered 28 July 1982 and 29 July 1982 in Superior Court, DUPLIN County. Heard in the Court of Appeals 20 October 1983.

Plaintiffs appeal from the granting of summary judgment in favor of all defendants in this action to recover rents due under a lease agreement.

Kornegay & Rice, P.A., by George R. Kornegay, Jr. and Janice Head for plaintiff appellants.

Baddour, Lancaster, Parker & Hine, P.A., by John C. Hine, for defendant appellee Smith.

William F. Simpson, Jr., for defendant appellee Alma Sutton Davis.

No brief filed for defendant Britt.

BECTON, Judge.

I

Factual and Procedural History

On 1 December 1074, Peary Davis executed a deed conveying a 249 acre tract of land in Duplin County to plaintiffs, his

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daughters. On the same date, plaintiffs and Davis executed a lease in which plaintiffs agreed to lease the property to Davis for the term of fifteen years. The lease also provided: "The annual rental during said period shall be determined by agreement between the parties at the expiration of each twelve (12) month period." Both documents were recorded on 9 December 1974. Peary Davis died on 22 January 1982.

Plaintiffs filed this action against the Executor of Peary Davis' Estate, Peary Davis' widow, Alma Sutton Davis, and a sublessee of Peary Davis, Marshall Britt. They alleged in their complaint that the lease had been duly executed, that they had not received any rents for the years 1979-1982, that no rental had been agreed upon for those four years, and that the reasonable rental for those four years was \$12,000.00 per year. They sought to recover rents from the defendants, jointly and severally, in the amount of \$48,000.00.

Defendant Marshall Britt filed an answer denying the material allegations of the complaint, and asserting the affirmative defenses of payment and estoppel. He alleged that he had rented the land for several years from Peary Davis, who had claimed that he owned the land and could rent it at will. He paid Davis an annual rental by check each January for the coming crop year. These checks, for the years 1978-1981, were duly endorsed by Davis. The 1982 check was endorsed by Alma Davis.

Defendant Alma Sutton Davis filed an answer in which she alleged that the deed, lease agreement, and an agreement in which she was granted a life estate in the residence were all part of an estate plan to reduce estate and inheritance taxes. She further alleged that it was contemplated by the parties to these agreements that no rents would be demanded by, or paid to, the plaintiffs and that Peary Davis would treat the properties as if he owned them in fee. Plaintiffs, therefore, were not entitled to any rents, and if they were, their claim was against the Estate of Peary Davis.

Defendant Executor filed an answer in which he admitted the execution of the deed and lease agreement. He alleged that there was an informal understanding that the profits from the land would be used to maintain and support Peary Davis during his lifetime. At no time did plaintiffs demand or receive any rent

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under the alleged lease, and consequently, they waived any claim for rent under the lease and are estopped from asserting such claim against the Estate of Peary Davis. Their failure to assert the claim constituted laches, and the statute of limitations barred their claim for 1979 rents.

All parties moved for summary judgment and filed affidavits in support of their motions.

Defendant Alma Sutton Davis stated in her affidavit that she was not a party to the lease agreement, that she had not received any monies as rent for the 1982 crop year from Marshall Britt, and that if any monies were received from Marshall Britt, they were received by Peary Davis.

The affidavits of plaintiffs indicated that they had not agreed with Peary Davis to lease the farm to him rent-free, but that, on the other hand, they had failed to discuss the rental charge with him. Defendant Executor, the husband of one of the plaintiffs, swore in an affidavit that, to his knowledge, Peary Davis never agreed to a rental for any year with the plaintiffs, and that plaintiffs had never made a demand for the rental. The lawyer who prepared the deed and lease agreement swore in an affidavit that the documents were prepared as part of an estate plan in which the land was removed from Davis' estate to reduce estate and inheritance taxes, yet Davis would be allowed to enjoy the land as if he continued to own it. It was intended by the plaintiffs and Davis that no rents would be due from Davis to the plaintiffs, and that the income from the property would be used by Peary Davis as he saw fit.

Based upon these materials, the trial court allowed defendants' motions for summary judgment and denied plaintiffs' motion for summary judgment. We must determine the propriety of the trial court's action.

II

Analysis

On appeal, plaintiffs have abandoned their claims for rents prior to the 1982 crop year and now claim that they are entitled, under N.C. Gen. Stat. § 42-7 (1976), to the proportion of the rents accruing after Peary Davis' death on 22 January 1982 until 31

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December 1982.¹ However, there is nothing in the record to indicate that this statute was brought to the trial court's attention. When a motion for summary judgment is granted, "the critical questions for determination upon appeal are whether *on the basis of the materials presented to the trial court*, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E. 2d 399, 401 (1980) (emphasis added). Our consideration is thus limited to the materials before the trial court.

The materials before the trial court support its grant of summary judgment for all defendants. We reject plaintiff's argument that the affidavits present a genuine issue of material fact as to whether plaintiffs agreed with Davis on an annual rental for the leased property. A genuine issue of material fact has been defined as one in which "the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. . . . [A] genuine issue is one which can be maintained by substantial evidence." *Zimmerman v. Hogg & Allen, P.A.*, 286 N.C. 24, 29, 209 S.E. 2d 795, 798 (1974) (quoting *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972)). Whether the plaintiffs and Davis agreed that Davis would not be charged rent makes no difference in the result of the action. Either way, plaintiffs could not prevail under the lease.

The amount of rent is an essential term of a lease under the law of contracts. *Carolina Helicopter Corp. v. Cutter Realty Co.*,

1. N.C. Gen. Stat. § 42-7 provides:

When any lease for years of any land let for farming on which a rent is reserved determines during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, or by a sale of said land under any mortgage or deed of trust, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor to the giving up such possession; and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession.

Mid-West Mut. Ins. Co. v. Govt. Employees Ins. Co.

263 N.C. 139, 139 S.E. 2d 362 (1964); J. Webster, *Webster's Real Estate Law in North Carolina* § 236 (P. Hetrick rev. ed. 1981). As a general rule, when an essential term of a contract is left open for future agreement, the alleged contract is void for indefiniteness. *Boyce v. McMahan*, 285 N.C. 730, 208 S.E. 2d 692 (1974). A lease, therefor, which leaves the amount of rent open for future agreement is void for indefiniteness. See Annot., 85 A.L.R. 3d 414, 432 (1978). As a consequence, plaintiffs are barred from recovering rent under the lease. Moreover, even if the lease were not void on its face, plaintiffs' admission in their complaint that they never reached agreement on the rental charge with Davis would bar them from enforcing the lease. Defendants were, therefore, entitled to judgment as a matter of law on the lease.

For the foregoing reasons, the judgment of the trial court is

Affirmed.

Chief Judge VAUGHN and Judge HEDRICK concur.

MID-WEST MUTUAL INSURANCE COMPANY v. GOVERNMENT EMPLOYEES INSURANCE COMPANY

No. 8210SC1002

(Filed 15 November 1983)

Insurance § 69— other insurance clause in uninsured motorist coverage—motorcycle as “automobile”

A motorcycle is an “automobile” within the meaning of language in an uninsured motorist endorsement providing that the uninsured motorist coverage is only “excess insurance” with respect to bodily injury to an insured while occupying an “automobile” not owned by the named insured. Therefore, a liability policy issued to a motorcyclist's father provided only excess coverage beyond the limits of the motorcyclist's own policy for injuries suffered by the motorcyclist when his motorcycle was struck by an uninsured vehicle.

APPEAL by plaintiff from *Lee, Judge*. Order entered 3 June 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 24 August 1983.

Mid-West Mut. Ins. Co. v. Govt. Employees Ins. Co.

Plaintiff appeals from allowance of defendant's motion for summary judgment in an action in which plaintiff seeks contribution from defendant under the "other insurance" clause of uninsured motorist coverage pursuant to defendant's policy.

Young, Moore, Henderson & Alvis, P.A., by Robert C. Paschal, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Nigle B. Barrow, Jr., and Timothy P. Lehan, for defendant appellee.

WHICHARD, Judge.

I.

Phillip Peters was injured when the motorcycle he was operating was struck by an uninsured pickup truck. At the time of the accident Peters had uninsured motorist coverage under a policy on his motorcycle for which he had paid premiums to plaintiff. Plaintiff settled the claim with Peters for \$15,000, which was within its policy limits.

Plaintiff then sought contribution from defendant on the basis of defendant's policy issued to Peters' father. Because Peters was living at home with his father at the time of the accident, he was classified as an insured under that policy. He was not, however, the named insured under that policy, nor had he made payments to defendant for this coverage.

Plaintiff argues that, by virtue of the "other insurance" language contained in defendant's uninsured motorist coverage, defendant's coverage was concurrent with its own. Defendant counters that the policy provides only excess coverage; and that since the settlement with Peters was within the policy limits, it is not liable to plaintiff. The applicable language of defendant's policy provides:

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured under this endorsement, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this en-

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dorsement exceeds the sum of the applicable limits of liability of all such other insurance.

The trial court agreed with defendant and granted its motion for summary judgment. Plaintiff appeals.

II.

The issue is whether the "other insurance" clause providing for excess coverage applies when the insured is occupying a motorcycle. If so, under the plain wording of the policy the court correctly allowed summary judgment. If not, pro rata contribution would be appropriate.

The definition section of defendant's policy provides little guidance. The policy contains definitions of both insured and uninsured automobiles, but does not define automobile. The terms "automobile" and "vehicle" appear, however, to be used interchangeably. Our Supreme Court has stated that "[a] motorcycle is a vehicle." *Anderson v. Insurance Co.*, 197 N.C. 72, 75, 147 S.E. 693, 694 (1929). The policy also contains a list of items not included within the terms "insured automobile" and "uninsured automobile," and motorcycles are not listed.

The parties have not cited, and our research has not disclosed, a North Carolina case interpreting the term "automobile" when used in the "other insurance" clause of uninsured motorist coverage. Cases interpreting the term in other parts of a policy, however, have held that it does not include a motorcycle. *E.g.*, *Hunter v. Liability Co.*, 41 N.C. App. 496, 501-02, 255 S.E. 2d 206, 209-10, *disc. rev. denied*, 298 N.C. 203 (1979). In some instances, though, the term has been construed to encompass motorcycles. *See Comr. of Insurance v. Automobile Rate Office*, 24 N.C. App. 223, 226, 210 S.E. 2d 441, 443 (1974) (term automobile liability insurance includes motorcycle liability insurance), *cert. denied*, 286 N.C. 412, 211 S.E. 2d 801 (1975).

It is significant that the previous cases addressed whether a motorcycle should be *included* within coverage. Our Supreme Court has stated that the apparent reason for excluding motorcycles was "the greater risk involved in insuring against the perils inherent in the use of motorcycles." *LeCroy v. Insurance Co.*, 251 N.C. 19, 23, 110 S.E. 2d 463, 466 (1959); *see also Anderson*

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v. Insurance Co., supra. Thus, because of the greater risk motorcycles present, the courts have been unwilling to hold that by using the term "automobile" insurance companies intended to insure motorcycles.

Here, however, we deal with an *exclusion* from coverage. The "other insurance" clause was intended to limit the liability of defendant, the non-primary insurer, to situations where there was either no insurance or inadequate insurance. There is no reason to presume that, in excluding automobiles with other insurance, defendant intended to insure the greater risk presented by relatives of the insured who have other insurance on motorcycles. To disallow coverage to a motorcycle when an automobile is covered, but allow coverage to a motorcycle when an automobile is excluded, would be a bizarre interpretation. The principles which have led our courts to hold that the term "automobile" does not encompass motorcycles when dealing with inclusion of coverage would thus seem to dictate a holding that the term does encompass motorcycles when dealing with exclusion from coverage in the context of an "other insurance" clause of uninsured motorist coverage. We thus hold that defendant's policy provided for excess coverage only, and plaintiff is not entitled to contribution.

III.

We note that some jurisdictions have held that the term automobile does not include motorcycles. *E.g., Phillips v. Midwest Mutual Insurance Co.*, 329 F. Supp. 853 (W.D. Ark. 1971); *Home Indemnity Co. v. Hunter*, 7 Ill. App. 3d 786, 288 N.E. 2d 879 (1972); *Midwest Mutual Insurance Co. v. Fireman's Fund Insurance Co.*, 258 S.C. 533, 189 S.E. 2d 823 (1972). Although the *Phillips* court held that the term automobile did not include a motorcycle, it still held, on the basis of the parties' intent, that the father's policy provided excess coverage only. It stated:

The record . . . does not establish that the plaintiff had any intention of insuring his son against uninsured motorists while riding the motorcycle when he purchased the policy from Northwestern, nor did Northwestern contemplate coverage of this type. . . . It is the duty of the court to carry out the intentions of the parties. 'Courts may enforce legal contracts or void illegal ones, but courts may not expand con-

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tracts beyond their terms and the intent of the parties.' *Harris v. Southern Farm Bureau Casualty Ins. Co.*, (1970) 247 Ark. 961, at page 965, 448 S.W. 2d 652, at page 654.

329 F. Supp. at 859.

We note further that at least two courts have held that the term automobile does include motorcycles under uninsured motorist coverage. *Rodriguez v. Maryland Indemnity Insurance Co.*, 24 Ariz. App. 392, 539 P. 2d 196 (1975); *Country-Wide Insurance Co. v. Wagoner*, 45 N.Y. 2d 581, 384 N.E. 2d 653, 412 N.Y.S. 2d 106 (1978).

Affirmed.

Judges JOHNSON and EAGLES concur.

ROSE ACOSTA JACOBS v. MICHAEL GRADY LOCKLEAR

No. 8216SC1245

(Filed 15 November 1983)

1. Negligence § 35.4— contributory negligence not shown—failure to grant judgment notwithstanding verdict error

The trial court erred in failing to grant plaintiff's motion for a judgment notwithstanding the verdict concerning the issue as to whether plaintiff contributed to her own injuries sustained in an automobile accident where the evidence tended to show that plaintiff, a pedestrian, was standing in a static position of safety in front of her own automobile when defendant backed his car into her and pinned her between the two automobiles and where there was no evidence that plaintiff knew defendant's vehicle was moving backwards until after the collision.

2. Trial § 11— comment on defendant's failure to testify—proper

In a civil trial, the trial judge erred in refusing to allow plaintiff's counsel to comment on defendant's failure to testify.

Judge HILL dissents.

APPEAL by plaintiff from *Lane, Judge*. Judgment entered 1 September 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals on 20 October 1983.

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Civil action wherein plaintiff seeks to recover for personal injuries sustained in an automobile accident in which plaintiff was pinned between the front of her motor vehicle and an automobile owned and driven by the defendant. At the conclusion of the evidence, issues were submitted to the jury and answered as follows:

1. Was the plaintiff, ROSE ACOSTA JACOBS, injured or damaged by the negligence of the defendant, MICHAEL GRADY LOCKLEAR?

Answer: Yes.

2. Did the plaintiff, ROSE ACOSTA JACOBS, by her own negligence contribute to her injury or damage?

Answer: Yes.

3. What amount, if any, is the plaintiff, ROSE ACOSTA JACOBS, entitled to recover for personal injury?

Answer: _____.

Judgment was entered upon the verdict from which plaintiff appealed.

Britt and Britt by William S. Britt for plaintiff appellant.

Page and Baker by H. Mitchell Baker, III, for the defendant appellee.

BRASWELL, Judge.

The plaintiff assigns as error the trial court's denial of her motions for directed verdict and for judgment notwithstanding the verdict. Since the state of the evidence necessary for a judgment notwithstanding the verdict is the same as that which requires a directed verdict, we consider these assignments collectively. Upon motion for a directed verdict in favor of the plaintiff, the defendant is entitled to the most beneficial construction of the evidence which it will reasonably bear. *Marshall v. Hubbard*, 117 U.S. 415, 29 L.Ed. 919, 6 S.Ct. 806 (1886). The evidence considered in this light tends to show the following sequence of events.

On the night of 6 July 1980 plaintiff and defendant along with members of their families and friends attended a party at a pack-

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house at Evans Crossroads. Food and alcoholic beverages were served at the party, but plaintiff drank a Pepsi Cola and nothing else. Automobiles were parked on both sides of the public road opposite the packhouse. Defendant's automobile was parked in a row of cars some ten to twelve feet in front of plaintiff's car. The area was well lighted.

Plaintiff, her husband, Eddie, her sisters Debra and Wanda, her brothers-in-law Pete and Ventis, went to her car at about 12:00 or 12:15 a.m. for the purpose of leaving. Because the traffic was rather heavy in both directions, they waited to leave and stood between plaintiff's car and defendant's car, engaging in general conversation. While plaintiff was standing in front of her car, she saw the defendant go to the car parked ten to twelve feet in front of her and open the door. She did not hear or see him start the vehicle. Plaintiff's attention was upon her brother-in-law, Ventis, with whom she was having a conversation.

Defendant was intoxicated. He started his car and without warning placed it in reverse, backed toward plaintiff, pinning her between the front of her car and the rear of defendant's car. Plaintiff sustained injuries to her legs. Others in plaintiff's party moved out of the path of defendant's car to safety.

[1] We hold that it was error not to grant the plaintiff judgment notwithstanding the verdict as to the second issue regarding contributory negligence. By analysis, the plaintiff, a pedestrian, standing in a static position of safety in front of her own automobile which was off the traveled portion of the roadway and on the shoulder, had no duty to anticipate that the defendant, parked about 12 feet in front of her, would negligently back his automobile against her. There is no evidence that she knew his vehicle was moving backwards until after the collision. There is no evidence that the plaintiff was aware or should have been aware that the defendant was backing up at the moment he did so. She did not hear him "crank up" his car. She never at any time saw his car back up. She never heard any horn or any sound of his car. There was no failure to keep a proper lookout for her own safety.

Immediately preceding the impact she was talking to her brother-in-law, Ventis Rogers, and her attention was directed to him. The plaintiff's husband, Eddie, and her sister, Debra, were

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standing three feet from the plaintiff and closer to and in the path of the defendant's car. The presence and location of these people added to her own zone of safety and increased her right not to anticipate that any imminent danger awaited her. From the facts before us, there was nothing that she negligently failed to do that endangered her safety.

The only allegation of contributory negligence, although stated in four parts in the answer, is her failure to act as a prudent person. In substance, the total allegations are that the plaintiff stood in an area of danger between two parked automobiles, that she remained between the cars when she knew that the defendant had entered his automobile, that she knew or should have known that the defendant would have to back up his automobile before leaving and "due to the darkness might not know that the defendant [*sic*] was behind him," and that she imprudently failed to remove herself from danger. We hold the evidence does not support these allegations.

Plaintiff also assigns as error the denial of her motion for a new trial on grounds that the verdict was not justified by the evidence. A motion to set aside a verdict and order a new trial is addressed to the sound discretion of the trial judge and "his ruling thereon is irreviewable in the absence of manifest abuse of discretion." *Britt v. Allen*, 291 N.C. 630, 635, 231 S.E. 2d 607, 611 (1977). We hold that the plaintiff has shown an abuse of discretion by the trial court in its denial of plaintiff's motion for a new trial. As a matter of law, there being no evidence upon which to submit to the jury an issue of contributory negligence, it was prejudicial error to do so.

[2] Finally, at trial the judge refused to allow plaintiff's counsel to comment on defendant's failure to testify. Being a civil matter, this refusal was error. "The truth of the facts was peculiarly within [defendant's] knowledge, and he was a competent witness. That he failed to go upon the stand [in a *civil* case] and contradict evidence affecting him so nearly was a pregnant circumstance which the jury might well consider, and which counsel, within proper limits, might call to their attention." *Hudson v. Jordan*, 108 N.C. 10, 12-13 (1891), 12 S.E. 1029, 1030, *reh. denied*, 110 N.C. 250, 14 S.E. 741 (1892). The *Hudson* court makes this point noting that the witness was in court but did not take the stand. We see

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no distinction in that case from the present case where the witness was absent from the courtroom.

However, the jury answered the first issue in favor of the plaintiff, establishing defendant's negligence. Hence, the trial court's ruling did not adversely affect the plaintiff on the only issue to which it was relevant.

Because of prejudicial error in submitting to the jury the issue of contributory negligence, we reverse and order a new trial.

New trial.

Judge ARNOLD concurs.

Judge HILL dissents.

BRENDA COMPTON BOZA v. H. MAX SCHIEBEL AND DURHAM COUNTY
HOSPITAL CORPORATION

No. 8214SC1311

(Filed 15 November 1983)

1. Rules of Civil Procedure § 56.6— summary judgment in negligence cases

While negligence issues are not ordinarily susceptible to summary disposition, a motion for summary judgment is proper when there is no genuine issue of material fact and reasonable men could only concede that the defendant was not negligent.

2. Physicians, Surgeons, and Allied Professions § 16.1— medical malpractice action— summary judgment for defendant surgeon

In an action to recover for injuries resulting from defendant surgeon's alleged negligent placement of an operating table safety strap during surgery on plaintiff, summary judgment was properly entered for defendant where the materials before the court showed that it was the operating room nurse rather than defendant who placed the safety strap on plaintiff prior to the surgery.

APPEAL by plaintiff from *Lee, Judge*. Judgment entered 24 September 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 October 1983.

Boza v. Schiebel

This is a civil action wherein the plaintiff seeks to recover damages resulting from defendants' allegedly negligent acts during the performance of surgery on the plaintiff.

Plaintiff entered Durham County General Hospital under the care of Dr. Schiebel for gynecological surgery. Following surgery she suffered numbness in her lower right leg and foot. Hospital records attributed the condition to pressure on the peroneal nerve during surgery. Plaintiff brought suit alleging the injury resulted from the negligent placement of an operating table safety strap.

Plaintiff deposed Dr. Schiebel and the operating room nurse. Following these depositions, both defendants moved for summary judgment. A hearing on the motions was conducted, and on 24 September 1981 an order was entered granting summary judgment for Dr. Schiebel and denying summary judgment as to the hospital.

Plaintiff dismissed her action against the hospital on 20 July 1982 pursuant to a settlement agreement. On 22 July 1982 plaintiff filed a notice of appeal from the 24 September 1981 order granting summary judgment in favor of Dr. Schiebel.

McCain & Essen, by Grover C. McCain, Jr., and Jeff Erick Essen, for plaintiff, appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by C. Ernest Simons, Jr., and Steven M. Sartorio, for defendant, appellee, Schiebel.

JOHNSON, Judge.

Assuming *arguendo* that plaintiff has lost her right to appeal by not giving notice of appeal within the time permitted by the statutes and rules after the entry of summary judgment for defendant on 24 September 1981, we treat the appeal as a petition for writ of certiorari and allow the same so that we can dispose of the matter on its merits.

Plaintiff assigns as error the court's order granting summary judgment in favor of defendant Schiebel.

[1] Negligence issues are not ordinarily susceptible to summary disposition. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.

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2d 419 (1979). However, where there is no genuine issue of material fact and reasonable men could only concede the defendant was not negligent, then a motion for summary judgment is proper. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975).

[2] Plaintiff seeks to recover from Dr. Schiebel solely on the theory that he was the person responsible for placing the safety strap on plaintiff prior to surgery and thus the person who committed the negligent act responsible for the injury. Plaintiff seeks to support this theory solely by the following statement made by Dr. Schiebel during his deposition:

[T]he strap is on when I come in the room and speak to the patient and tell the anesthetist, "Okay, go ahead with anesthesia," and I go out to scrub, when I come back in, I have to put a catheter in the patient on this type of operation.

So the strap is removed at that time, not changed in its tension, because the strap simply hooks on each side, and you just unhook one side and flip it over. The patient is frog-legged for a moment, not with any stirrups or anything like that; the catheter is put in; then put back in a straight position, and the safety strap is hooked back as it was before. There was no change in—let's say in the tension of the draw part, like you would tighten yourself in a seat belt in a plane. It went back just exactly as it was before.

Q. Do you recall doing that in Mrs. Boza's surgery?

A. Yes sir. I recall doing that personally. I do that personally on every one of them that I operate on, and I know I did it on her.

Plaintiff contends these statements raise at least an inference that Dr. Schiebel was responsible for placing the strap on plaintiff prior to the surgery and thus the person who committed the negligent act.

To evaluate the significance of these statements we must examine them in context with defendant's total deposition. Such an examination reveals the following testimony:

Q. Doctor, did you have any part or function in placing or positioning or strapping or buckling the safety strap that held Mrs. Boza to the table?

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A. No, sir, I did not.

Q. That is a function that is performed by other nursing personnel in the operating room?

A. Normally functioned by the person we list as the circulating nurse.

. . .

Q. At any time during the operative procedure on Mrs. Boza, did you personally adjust the tension on this strap?

A. No, there is no way. That's in the non-sterile field, Mr. McCain.

. . .

Q. And as I understand it, you are not involved in placing or putting tension on the strap on either of the two occasions in which the strap was put on?

A. I am not.

Q. And the first time the strap was placed on, are you normally even in the operating room?

A. I'm usually not in the operating room.

. . .

Q. And I believe you mentioned in your testimony one time a little earlier that when the strap is placed on the patient the second time, you are not involved in that, either?

A. No. I'm sterile at that time.

We recognize that on defendant's motion for summary judgment plaintiff is entitled to have the evidence considered in the light most favorable to her and have any conflicts in the evidence resolved in her favor. Here there is no conflict in the evidence presented. When the statement relied upon by plaintiff is examined in context with defendant's total statement it is manifestly clear that what defendant was talking about personally doing was putting the catheter in the plaintiff. Defendant's testimony, coupled with that of the operating room nurse, that it is the nurse who places the safety strap on patients completely destroys plaintiff's theory of recovery against Dr. Schiebel.

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There is no genuine issue as to a material fact and from this forecast of evidence reasonable men could only conclude the defendant was not negligent. Therefore, summary judgment was properly granted.

Affirmed.

Judges HILL and BECTON concur.

WILLIAM G. GODLEY, EMPLOYEE, PLAINTIFF v. HACKNEY & SONS, EMPLOYER;
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, CARRIER,
DEFENDANTS

No. 8210IC1288

(Filed 15 November 1983)

Master and Servant § 94.3— right of Industrial Commission to amend deputy commissioner's findings of fact

The full Industrial Commission, upon reviewing an award by a hearing commissioner, is not bound by the findings of fact supported by evidence but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner.

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission filed 5 October 1982. Heard in the Court of Appeals 27 October 1983.

This is a proceeding under the North Carolina Workers' Compensation Act wherein the plaintiff seeks to recover compensation for a back injury allegedly sustained on 6 February 1980.

The plaintiff's claim was heard by a deputy commissioner on 30 June 1981. The deputy commissioner filed an opinion and award denying plaintiff's claim, because he found that the plaintiff had not sustained an injury by accident within the meaning of N.C. Gen. Stat. Sec. 97-2(6).

Plaintiff filed an application, dated 13 May 1982, seeking review by the North Carolina Industrial Commission (hereinafter Commission). The appeal was heard on 15 September 1982. The Commission awarded the plaintiff compensation for his injury in an opinion and award which in pertinent part provided:

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. . .

3. The plaintiff normally lifted, moved and lowered truck bodies, insulated and uninsulated, with the help of three other employees in his assembly line crew. A short time prior to February 6, 1980 the plaintiff's crew was reduced from four to three members.

4. On February 6, 1980 the plaintiff injured his lower back while handling an insulated, heavier-than-usual truck body. It was the first truck body of its type that the plaintiff was required to lift to the "set-up hole" with his newly reduced work crew, although he had similarly lifted smaller truck bodies with the help of only two others on occasions in the past. The plaintiff did not know the weight of the particular truck body he was lifting when his injury occurred but it appeared at the time to be about the same as others his crew had handled with four members.

. . .

7. At the time in question, the plaintiff injured his back as a result of an interruption of his normal work routine.

. . .

15. While doing his job on February 6, 1980 plaintiff injured his low back as a result of an interruption of his normal work routine, to wit, a reduction in his assembly line work crew which required him to lift substantially greater weights than he was accustomed to in his job.

16. Plaintiff sustained an injury by accident arising out of and in the course of his employment on February 6, 1980.

The Conclusion of Law in the Opinion and Award of December 31, 1981 is hereby stricken and the following is inserted in lieu thereof:

CONCLUSION OF LAW

The plaintiff, at the time complained of, sustained an injury by accident arising out of and in the course of his employment and is, therefore, entitled to benefits under the Workers' Compensation Act. G.G. [sic] 97-2(6).

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The Award in the Opinion and Award is hereby stricken and the following inserted in lieu thereof:

AWARD

1. Defendants shall pay the plaintiff compensation at the rate of \$148.00 per week for the period from February 13, 1980 until March 28, 1980 and for the period between June 3, 1980 and November 7, 1980 when the plaintiff reached maximum medical improvement, subject to an attorney fee approved herein. Since the plaintiff's compensation has accrued, it shall be paid in a lump sum without commutation.

2. Defendants shall pay the plaintiff compensation at the rate of \$148.00 per week for 45 weeks for his permanent partial disability of the back.

3. Defendants shall pay all medical expenses incurred by plaintiff as a result of the injury by accident that gave rise to this claim when such bills are submitted to and approved by the Industrial Commission.

4. An attorney's fee equal to 25 percent of compensation due the plaintiff shall be deducted and paid directly to his attorney.

5. Defendants shall pay the costs.

From the opinion and award of the Commission awarding compensation to the plaintiff, the defendants appealed.

Wilkinson & Vosburgh, by James R. Vosburgh, for the plaintiff, appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Dan M. Hartzog and Theodore B. Smyth, for the defendants, appellants.

HEDRICK, Judge.

Based upon eight assignments of error, the defendants contend the Commission erred "in altering the deputy commissioner's findings of fact as to the circumstances surrounding the plaintiff's injury." Defendants argue that the Commission does not have the authority to amend a deputy commissioner's findings

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of fact if there is competent evidence in the record to support the deputy commissioner's findings. We disagree. The Commission's authority to review deputy commissioner's awards is granted by N.C. Gen. Stat. Sec. 97-85 which in pertinent part provides:

If application is made to the Commission . . . the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. . . .

It is well established that the Commission, upon reviewing an award by the hearing commissioner, is not bound by the findings of fact supported by evidence, but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner. *Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976); *Lee v. Henderson & Associates*, 284 N.C. 126, 200 S.E. 2d 32 (1973); *Robinson v. J. P. Stevens*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982). Therefore, the defendants' assignments of error have no merit.

We do not consider defendants' second question because it is reached only if the defendants prevail on the first issue.

The opinion and award of the North Carolina Industrial Commission filed 5 October 1982 is affirmed.

Affirmed.

Judges HILL and BECTON concur.

State v. Kelley

STATE OF NORTH CAROLINA v. RANDALL RAY KELLEY

No. 8322SC229

(Filed 15 November 1983)

1. Automobiles and Other Vehicles § 121— “operating” vehicle with blood alcohol content of .10%—sufficiency of evidence

The State's evidence was sufficient to show that defendant “operated” a vehicle so as to support his conviction of driving with a blood alcohol content of .10% or more by weight where it tended to show that an officer observed defendant seated behind the steering wheel of a car with the engine running; there was no one else in the car; and defendant made a statement admitting his operation of the car.

2. Automobiles and Other Vehicles § 122— emergency strip adjacent to interstate highway—part of highway

The operation of a vehicle on the emergency strip adjacent to an interstate highway constituted the operation of the vehicle on a “highway” so as to support the conviction of defendant for driving with a blood alcohol content of .10% or more by weight.

APPEAL by defendant from *Walker (Russell)*, Judge. Judgment entered 11 January 1983 in Superior Court, IREDELL County. Heard in the Court of Appeals 27 October 1983.

Defendant was charged with driving with a blood alcohol content of .10 percent or more by weight. He was convicted of this offense following a trial de novo in Superior Court and sentenced to six months imprisonment, suspended for two years on specified terms and conditions. From this judgment defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Aimee A. Toth, of Counsel to Harris & Pressly, for defendant, appellant.

HEDRICK, Judge.

At the outset we note defendant's failure to comply with Rule 28, North Carolina Rules of Appellate Procedure, in the organization of his brief. Defendant's violation of Rule 28 has increased considerably the difficulty of our task in evaluating appellant's arguments. Despite this difficulty, we have given full and fair consideration to those assignments of error not waived

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by appellant, and we conclude that the defendant had a fair trial free from prejudicial error.

The following facts are uncontroverted: On 28 August 1982 at approximately 1:20 a.m. a State Trooper observed defendant's vehicle parked on an emergency strip of Interstate 40. The engine was running and the car's flashers were on. On approaching the car, the officer observed defendant slumped over the steering wheel. When tapping on the window failed to elicit a response, the officer opened the car door and physically shook the defendant. The officer testified that he detected a strong odor of alcohol, and that defendant "was very unsteady on his feet." The officer arrested the defendant, who stated to the officer that he had been returning home from a club prior to pulling off the road. Subsequent testing indicated a blood alcohol level of .15.

In his first three assignments of error defendant challenged the sufficiency of the evidence to support the verdict. Specifically, defendant argues that there was insufficient evidence of two elements of the offense: first, that defendant "operated" the vehicle, and second, that his operation was "upon any highway or any public vehicular area." See N.C. Gen. Stat. Sec. 20-138(b).

[1] N.C. Gen. Stat. Sec. 20-4.01(25) defines "operator" as "[a] person in actual physical control of a vehicle which is in motion or which has the engine running." We believe that in the present case there was ample evidence from which the jury could infer that defendant had "operated" the vehicle while in an intoxicated condition. The officer observed defendant seated behind the steering wheel of the vehicle, with the car engine running. There was no one else in the car. Defendant made a statement admitting his operation of the vehicle. Plainly there was sufficient evidence on this point to support the jury's verdict.

[2] Turning to defendant's remaining contention, that there was insufficient evidence of his operation of the car on a "highway," we note the statutory definition of the word:

The entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic. . . .

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N.C. Gen. Stat. Sec. 20-4.01(13). We think it clear that the emergency strip adjacent to interstate highways falls within the literal language of this definition. Our conclusion is buttressed by the definition of "roadway" contained in N.C. Gen. Stat. Sec. 20-4.01(38): "That portion of a highway . . . ordinarily used for vehicular travel, exclusive of the shoulder. . . ." See also *Smith v. Powell, Comr. of Motor Vehicles*, 293 N.C. 342, 346, 238 S.E. 2d 137, 140 (1977): "The definition of 'highway' in G.S. 20-4.01(13) is . . . to be construed so as to give its terms their plain and ordinary meaning."

Defendant also assigns error to the trial court's instructions to the jury on the issues discussed above. Rule 10(c) of the North Carolina Rules of Appellate Procedure states:

The exceptions upon which a party intends to rely shall be indicated by setting out at the conclusion of the record on appeal assignments of error based upon such exceptions. . . . Exceptions not thus listed will be deemed abandoned. . . .

Our examination of the record reveals neither exceptions nor assignments of error relating to the court's charge to the jury. Furthermore, the record indicates that defendant did not object to instructions concerning the meaning of "public highway," as is required by Rule 10(b)(2). We thus find that defendant has waived his right to raise this issue on appeal.

No error.

Judges HILL and BECTON concur.

STATE OF NORTH CAROLINA v. CARDELL CATLETT LIPSCOMB

No. 8314SC236

(Filed 15 November 1983)

1. Criminal Law § 102— argument to jury—no gross impropriety

The prosecuting attorney's argument did not constitute gross impropriety likely to influence a jury verdict, and the trial judge did not abuse his discretion in allowing the prosecutor's argument.

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2. Criminal Law § 138— failure to list mitigating factors—no error

It is not necessary for a trial judge to publish a list of his considerations and the disposition thereof in a sentencing hearing. It is only necessary, if the trial judge elects to vary the suggested term of punishment, that he set out in the judgment the factors shown by a preponderance of the evidence to be present and find: (a) that factors in aggravation outweigh factors in mitigation or factors in mitigation outweigh factors in aggravation; and (b) that the factors marked were proven by a preponderance of the evidence.

3. Criminal Law § 138— second degree murder conviction—aggravating factor that deadly weapon used improperly considered

In the sentencing hearing for a second degree murder conviction, the trial judge erred in finding as a factor in aggravation that the defendant was armed with or used a deadly weapon at the time of the crime. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Herring, Judge*. Judgment entered 17 September 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 October 1983.

Cornelia Blassingame Martin died of a gunshot wound on 1 January 1982. Cardell Catlett Lipscomb, the defendant, turned himself in the same day. He was charged and convicted of second degree murder, and sentenced to twenty years imprisonment. He appeals.

Attorney General Rufus L. Edmisten by Assistant Attorney General Robert R. Reilly for the State.

Jerry B. Clayton and Robert W. Myrick for defendant-appellant.

HILL, Judge.

[1] Defendant in great detail attacks the arguments made to the jury by the prosecuting attorney, contending such arguments constituted prejudicial error. Defendant argues the prosecuting attorney unfairly accused the attorneys for the defendant of using subliminal suggestion, and that he argued evidence which had been excluded at trial along with evidence that had not been introduced at trial.

We have examined the record and briefs; and while portions of the argument may not be the epitome of closing argument, we nevertheless find no prejudicial error. It is elementary that counsel be allowed wide latitude in argument to the jury, in-

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cluding the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Conner*, 244 N.C. 109, 92 S.E. 2d 668 (1956). Counsel for both sides may use language consistent with the facts in evidence to present each side of the case. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there exists such gross impropriety in the argument as would be likely to influence the verdict of the jury. *State v. Wortham*, 287 N.C. 541, 215 S.E. 2d 131 (1975). *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Applying the foregoing principles to the case under review, we hold that the prosecuting attorney's argument did not constitute gross impropriety likely to influence the jury verdict. This assignment of error fails to reveal prejudicial error for which the judgment below should be disturbed.

[2] In regard to the issue of whether defendant's sentence is supported by the evidence introduced at the sentencing hearing, the defendant complains the trial judge did not list all the mitigating factors which he alleges were provided the court for consideration. We do not find it necessary that the judge do so. The legislature has provided fifteen aggravating and fourteen mitigating factors to be specifically considered by the judge, together with an opportunity to consider in writing additional aggravating and mitigating factors. While the trial judge is required to consider all of the statutory aggravating and mitigating factors, it is not necessary that he publish a list of his considerations and the disposition thereof. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). It is only necessary, if the trial judge elects to vary the suggested term of punishment, that he set out in the judgment the factors shown, by a preponderance of the evidence, to be present and find: (a) that factors in aggravation outweigh factors in mitigation or factors in mitigation outweigh factors in aggravation; and (b) that the factors marked were proven by a preponderance of the evidence.

[3] However, since we find that the trial judge erred in making a finding in aggravation and imposed a prison term in excess of the presumptive sentence, we are obliged to remand this case for resentencing. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689

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(1983). The court found, as a factor in aggravation, that the defendant was armed with or used a deadly weapon at the time of the crime. "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . ." G.S. 15A- 1340.4(a)(1). In this case the offense was second degree murder which was committed by the defendant shooting his victim with a gun. This Court has held that use of a deadly weapon was improperly considered as a factor in aggravation in second degree murder cases, on the ground that evidence thereof was essential to prove malice, an element of second degree murder. *State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983); *State v. Keaton*, 61 N.C. App. 279, 300 S.E. 2d 471 (1983). An erroneous aggravating factor was used by the trial judge and a prison term in excess of the presumptive term imposed. Therefore, the case must be remanded for resentencing.

Remanded.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. ERIC SIMONS

No. 8312SC200

(Filed 15 November 1983)

Burglary and Unlawful Breakings § 7— first degree burglary—whether dwelling occupied—necessity for submitting second degree burglary

The trial court in a first degree burglary case erred in failing to submit to the jury the lesser included offense of second degree burglary where the evidence tended to show that the two victims returned to their home some time after 11:30 p.m.; the two victims then watched television for awhile but soon fell asleep on separate couches in the living room; both the front and back doors were locked at the time the victims went to sleep; the two victims later awoke to find defendant crouched on the living room floor; when confronted, defendant ran down a lighted hall and through an open, unlocked back door; the two victims later discovered that a back bedroom window was unlocked and slightly open; and before going to sleep, neither victim had checked the back bedroom window, since the evidence would permit, but not require, the jury to find that defendant entered the home when it was unoccupied, that he was caught inside when the two victims came home, and that he waited in secrecy in the unoccupied bedroom until the victims went to sleep.

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APPEAL by defendant from *Samuel E. Britt, Judge*. Judgment entered 12 October 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 25 October 1983.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgett, for the State.

James R. Parish for defendant appellant.

BECTON, Judge.

From a judgment imposing a twenty-year active sentence following his conviction of first degree burglary, defendant, Eric Simons, appeals. The sole question on appeal is whether the trial court committed "reversible error in failing to instruct the jury on second degree burglary as a possible verdict." Having considered the facts of this case and our Supreme Court's decisions in *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979); *State v. Allen*, 279 N.C. 115, 181 S.E. 2d 453 (1971); and *State v. Tippet*, 270 N.C. 588, 155 S.E. 2d 269 (1967), we answer the question "yes" and award defendant a new trial.

I

After working an evening shift at a Fayetteville restaurant on 20 March 1982, Judy Wilkes and Laura Hasty returned to their home at 603 School Street between 11:30 p.m. and midnight. Judy Wilkes opened the front door with her key and then re-locked the door after she and Laura Hasty entered the house. The two women then watched television for awhile but soon fell asleep on separate couches in the living room. They awoke to find a man, later identified as defendant, crouched down on the living room floor. When confronted, the man ran down a lighted hall and through an open, unlocked back door. The back door had been locked at the time the women went to sleep. The two women later discovered that all the windows were still locked, except a back bedroom window which was not only unlocked, but also slightly open. Before going to sleep, neither Judy Wilkes nor Laura Hasty had checked the back bedroom window. Neither Wilkes nor Hasty called the police.

At approximately 4:00 a.m. on 21 March 1982, one of Ms. Wilkes' neighbors, who was returning home, saw a man looking into the window of Ms. Wilkes' home. The neighbor drove to a

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truck stop and notified a police officer, who, when he arrived upon the scene, saw defendant walking from the side of Ms. Wilkes' house. While the police officer was talking to defendant, Ms. Wilkes came out and identified the defendant as the man who had been in her house earlier that morning. Defendant was then arrested for burglary.

II

Burglary is defined as the breaking and entering of a dwelling or sleeping apartment during the nighttime with intent to commit a felony therein. If the burglarized dwelling is occupied, the crime is burglary in the first degree; but if it is unoccupied, however momentarily, and whether known to the intruder or not, the crime is burglary in the second degree. See *State v. Tippet*; N.C. Gen. Stat. § 14-51 (1981); N.C. Gen. Stat. § 14-54 (1981). Because there is no positive or direct evidence as to when the defendant broke and entered Ms. Wilkes' home, the trial court's failure to charge on second degree burglary is prejudicial error.

The facts outlined in Part I above would permit, although not require, the jury to find that defendant entered the house when it was unoccupied; that he was caught inside when the two women came home later that night; and that he waited in secrecy in the unoccupied bedroom until the two women had gone to sleep. And it does not matter that there are other facts and inferences suggesting that defendant broke into the house after the women went to sleep—for example, the opened, unlocked back door, the lighted hallway, and the darkened living room (the circuit breaker for the living room area of the house had evidently been tripped since the television was on when the women went to sleep). The question before the trial judge was whether there were any facts and inferences suggesting second degree burglary.

The facts in this case are remarkably similar to, but less egregious than, the facts in *State v. Powell*. In *State v. Powell*, a Reverend Baynard and his wife returned home from a trip to Asheville around 9:30 p.m. on 28 April 1978. They went to bed in separate rooms at about 10:00 p.m., and Reverend Baynard went to sleep approximately 1:00 a.m. In the early morning hours of 29 April 1978 Mrs. Baynard was awakened by a man making a "huffing sound" at her bedroom door. The man beat her on the head, tied a rag around her mouth, dragged her outside and raped her.

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Mrs. Baynard had twenty-three stitches in her head. Later, Reverend Baynard was assaulted, and thirty stitches were required to close the wound to his head. On these facts the *Powell* Court said, as though writing for this case:

In the case before us, there is no positive evidence as to when the intruder first entered the Baynard home on 28 or 29 April 1978. There is no evidence that Reverend or Mrs. Baynard checked the third bedroom before retiring. The record does indicate, however, that entry to the house was gained by breaking a window in the unoccupied bedroom, but neither Reverend nor Mrs. Baynard was awakened by the sound of shattering glass. . . . Thus, the jury could have found that the intruder entered the house when it was unoccupied, got caught there when the Baynards came home later that night and waited in the third bedroom until Reverend Baynard went to sleep before he acted. Under these facts, the trial court was required to submit second degree burglary to the jury as a possible verdict. Its failure to do so entitles the defendant to a new trial on his conviction for first degree burglary.

297 N.C. at 424, 255 S.E. 2d at 157. In addition to *State v. Powell*, the Supreme Court's opinions in *State v. Allen* and *State v. Tippet* also support the conclusions we reach. It is not necessary to restate the facts in *Allen* or *Tippet*. They, too, tell us that the question whether a house is actually occupied at the time an intruder breaks and enters is for the jury. Lesser included offenses are substantive features of the case. It is the duty of the trial court to instruct the jury upon lesser included offenses that arise from the evidence. See *State v. Harris*, 306 N.C. 724, 295 S.E. 2d 391 (1982).

For the foregoing reasons, defendant is entitled to a

New trial.

Judges HEDRICK and ARNOLD concur.

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STATE OF NORTH CAROLINA v. VINCE R. PEOPLES

No. 8312SC29

(Filed 15 November 1983)

Narcotics §§ 1.3, 2— indictment for possessing with intent to sell and deliver hashish—conviction of felony possession of hashish—not lesser included offense

Felony possession of hashish is not a lesser included offense of possession with intent to sell and deliver hashish in violation of G.S. 90-95(a)(1), the charge for which defendant was indicted, and the trial judge erred in submitting to the jury the verdict issue of felony possession of hashish. Further, since the indictment he was tried under did not allege that the amount of hashish possessed weighed more than one-tenth of an ounce, an element of the crime, defendant was convicted of a crime that he had not been properly indicted for. G.S. 90-95(d)(4).

APPEAL by defendant from *Herring, Judge*. Judgment entered 24 June 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 26 September 1983.

Defendant was indicted for possessing with intent to sell and deliver hashish in violation of G.S. 90-95(a)(1). The indictment did not allege the amount of hashish that defendant possessed. At trial, in addition to the offense charged, the jury was also permitted to consider whether defendant was guilty of felony possession of hashish and misdemeanor possession of hashish. The jury found defendant guilty of felony possession of hashish, and the trial judge entered judgment on the verdict.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

PHILLIPS, Judge.

It is well-established under our law that one being tried under a bill of indictment can properly be convicted of any lesser offense that is included therein, G.S. 15-170, and that a crime is not a lesser included offense of another crime if the former contains any element that the latter does not. *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967).

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In submitting the verdict issues to the jury the court was under the impression that felony possession of hashish is a lesser included offense of the crime defendant was indicted for. But that is not the case, because the crime of felony possession of hashish contains an element that possessing with the intent to sell and deliver hashish does not. The amount of hashish possessed is not an element of the crime of possessing with the intent to sell and deliver hashish, as established by G.S. 90-95(a)(1); whereas, the crime of felony possession of hashish consists of possessing more than one-tenth of an ounce of hashish. G.S. 90-95(d)(4).

The substance called hashish and the substance called marijuana are both derivatives of the plant *cannabis sativa* L. Both are included in Schedule VI of the Controlled Substances Act under the general heading "marijuana." G.S. 90-94, 95. Marijuana or marihuana, is the Mexican name for the plant. Taber's Cyclopedic Medical Dictionary (7th ed. 1958). But though marijuana is generally thought of on the street and in the trade as dried leaves of the contraband plant, statutorily it is all parts of the plant and nearly all its derivatives. G.S. 90-87(16). Hashish, however, is the compressed resin extracted from the plant. G.S. 90-95(d)(4).

In the Controlled Substances Act marijuana and hashish are treated differently only in the statute which sets the penalty for felony possession. Simple possession of each is a misdemeanor; possession of more than an ounce of marijuana is a felony; possession of more than one-tenth of an ounce of hashish is a felony. G.S. 90-95(d)(4). This distinction was apparently made by the Legislature because the active ingredient in marijuana is contained in the plant's resin, which is more concentrated in the extracted hashish than in the dried leaves of the plant itself.

Thus, under our law defendant has not been convicted of a lesser included offense. *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979). Furthermore, since the indictment he was tried under did not allege that the amount of hashish possessed weighed more than one-tenth of an ounce, an element of the crime, he has been convicted of a crime that he has not been properly indicted for. This is not permissible under our law and the conviction cannot stand. *State v. Baldwin*, 61 N.C. App. 688, 301 S.E. 2d 725 (1983). But misdemeanor possession of hashish—the unauthorized posses-

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sion of any quantity of the substance at all—is a lesser included offense of the crime that defendant was indicted for. *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974). And since the record clearly establishes defendant's guilt of that lesser crime, instead of returning the case for reindictment and retrial, we remand it for entry of judgment as on a verdict of guilty of misdemeanor possession of hashish. This course has been approved in previous cases. *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982).

Remanded for judgment.

Chief Judge VAUGHN and Judge WHICHARD concur.

JAMES GRAHAM SASSER, BY HIS GUARDIAN AD LITEM, LESLIE DELEON SASSER, SR. v. SAM BECK AND WIFE, MRS. SAM BECK, T/A THE PRINCESS MOTEL

No. 8230SC1154

(Filed 15 November 1983)

Negligence § 57.9— injuries at motel swimming pool—insufficient evidence of negligence of owners

The minor plaintiff's evidence was insufficient to show that injuries he received at a motel swimming pool were caused by the negligence of defendant motel owners where plaintiff presented evidence only that he was a guest at the motel; a fence partially enclosed the pool and a sign thereon warned that no lifeguard was on duty and bathers swam at their own risk; plaintiff's grandfather took him and his brother to the pool and returned to the motel room; several minutes later the grandparents discovered plaintiff lying on the bottom of the pool; and motel employees rescued plaintiff but he suffered permanent injuries.

APPEAL by plaintiff from *Lamm, Judge*. Judgment entered 25 May 1982 in JACKSON County Superior Court. Heard in the Court of Appeals 26 September 1983.

Plaintiff, age seven, was, together with his grandparents, a guest at defendants' motel. A fence partially enclosed the motel swimming pool, and a sign thereon warned that no lifeguard was on duty and bathers swam at their own risk.

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Plaintiff's grandfather took him and his eleven-year-old brother to the pool and returned to his motel room. Several minutes later the grandparents discovered plaintiff lying on the bottom of the pool. Motel employees rescued plaintiff, but he suffered serious permanent injury.

This Court resolved questions of jurisdiction in *Sasser v. Beck*, 40 N.C. App. 668, 253 S.E. 2d 577, *disc. rev. denied*, 298 N.C. 300, 259 S.E. 2d 915 (1979). At a trial limited to the issue of defendants' negligence, the court entered a directed verdict for defendants at the close of plaintiff's evidence.

Plaintiff appeals.

Duke and Brown, by John E. Duke, and Hulse and Hulse, by Herbert B. Hulse, for plaintiff appellant.

Herbert L. Hyde and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Samuel G. Thompson and Robin K. Vinson, for defendant appellees.

WHICHARD, Judge.

To overcome the motion for directed verdict plaintiff was "required to offer evidence sufficient to establish, beyond mere speculation or conjecture, every essential element of negligence." *Oliver v. Royall*, 36 N.C. App. 239, 242, 243 S.E. 2d 436, 439 (1978). The basic elements of negligence are a duty owed by defendants to plaintiff and nonperformance of that duty, proximately causing injury and damage. *See Spake v. Pearlman*, 222 N.C. 62, 65, 21 S.E. 2d 881, 883 (1942); W. Prosser, *Law of Torts* § 30, at 143 (4th ed. 1971).

The parties stipulated that plaintiff suffered injuries, but on the evidence presented the jury could only *speculate as to* their cause. *See Justice v. Prescott*, 258 N.C. 781, 129 S.E. 2d 479 (1963); *Hahn v. Perkins*, 228 N.C. 727, 46 S.E. 2d 854 (1948); *Adams v. Enka Corp.*, 202 N.C. 767, 164 S.E. 367 (1932). Plaintiff offered no evidence showing that he sustained his injuries by reason of some defect in the pool, that additional safety precautions would have prevented the injuries, or that their absence proximately caused the accident. *See Adams v. Enka Corp., supra*. He presented no evidence that additional safety measures were re-

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quired by statute or ordinance. *See Bell v. Page*, 2 N.C. App. 132, 162 S.E. 2d 693 (1968). He presented no medical evidence concerning the cause of his injuries.

The record indicates that plaintiff's brother accompanied him and apparently remained at the pool through the brief period preceding the discovery of plaintiff at the bottom of the pool. The brother did not testify, however.

In sum, "[e]vidence of actionable negligence is lacking." *Justice, supra*, 258 N.C. at 782, 129 S.E. 2d at 480. The evidence shows that an unfortunate injury occurred, but leaves to pure speculation the question of the cause. Under these circumstances, pursuant to prior decisions of our appellate courts, a directed verdict for defendants was appropriate. *Justice v. Prescott, supra; Hahn v. Perkins, supra; Adams v. Enka Corp., supra; Oliver v. Royall, supra; cf. Corda v. Brook Valley Enterprises, Inc.*, 63 N.C. App. 653, 306 S.E. 2d 173 (1983) (directed verdict in swimming pool death case reversed where plaintiff presented expert safety evidence, expert medical evidence on causation, and medical reports).

Affirmed.

Chief Judge VAUGHN and Judge PHILLIPS concur.

GRACE S. SYKES v. DEAN JEFFREY FLOYD AND GRACE S. SYKES, EX-
ECUTRIX OF THE ESTATE OF ERNEST WILLIE SYKES v. DEAN JEFFREY FLOYD

No. 8212SC1279

(Filed 15 November 1983)

Appeal and Error § 31.1— failure to object to and request special instructions— assignments of error overruled

Where defendant never specifically requested limiting instructions pursuant to G.S. 1A-1, Rule 51(b), the assignments of error relating to the trial court's instructions were overruled.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 9 September 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 25 October 1983.

Sykes v. Floyd and Sykes v. Floyd

This is a civil action to recover damages for personal injury suffered by plaintiff and her deceased husband, Ernest Willie Sykes, arising out of an automobile collision which occurred in Fayetteville, North Carolina. By stipulation of the parties, the case was tried on the issue of damages only. From the judgment entered, defendant appealed.

McLeod and Senter, by Joe McLeod and John Michael Winesette, for plaintiff appellee.

Nance, Collier, Herndon and Ciccone, by James R. Nance, Jr., for defendant appellant.

HILL, Judge.

By his first assignment of error, defendant contends the court erred in failing to instruct the jury that certain photographs admitted as plaintiff's exhibits were admitted for illustrative purposes only and were not substantive evidence. Clearly such photographs are not admissible as substantive evidence, 1 Stansbury's N.C. Evidence § 34 (Brandis rev. 1973), but they are admissible for the purpose of illustrating testimony and were so used by the plaintiff here. But in the absence of a timely request, failure to instruct that photographs are admitted for illustrative purposes only is not error. *Sidden v. Talbert*, 23 N.C. App. 300, 303, 208 S.E. 2d 872, 874, cert. denied, 286 N.C. 337, 210 S.E. 2d 58 (1974).

A review of the record reveals that no objection was made to the introduction of the photographs though defendant's counsel did state that he wanted to request an instruction. There is no showing that the court heard this statement and it is clear defendant never specifically requested such instruction. G.S. 1A-1, Rule 51(b) provides that "[r]equests for special instructions must be in writing, entitled in the cause, and signed by the counsel or party submitting them." Defendant failed to comply with this provision; therefore, this assignment of error is overruled.

Secondly, defendant assigns as error the court's failure to charge that any disability to the plaintiff's intestate would only be considered by the jury up until the date of his death. Again, defendant did not submit a request for special instructions so charging the jury as required by G.S. 1A-1, Rule 51(b) and, therefore, is not allowed to assert this issue on appeal.

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In his remaining assignments of error, defendant argues the court erred in failing to recount any testimony favorable to defendant as brought forth through plaintiff's evidence or any contentions on behalf of the defendant. We have examined the court's charge to the jury and found the court adequately stated the contentions of the parties and the pertinent facts to which the law was to be applied. We hold defendant received a fair trial free from prejudicial error.

No error.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. WILLIAM FRANK McCLEARY

No. 8227SC1115

(Filed 6 December 1983)

1. **Gambling § 3; Statutes § 4.2— lottery statutes—error to dismiss warrants against defendant—question of whether valid and invalid parts of statute are separable not reached**

In prosecutions for advertising a lottery and dealing in a lottery, the trial court erred in dismissing the warrants against defendant even if its determination that G.S. 14-292.1 is unconstitutional was correct since the statutory provisions are clearly separable in purpose, and it is safe to assume that the legislature would have retained the general gambling or lottery prohibitions as operative in the event that the charitable exemption was judicially determined to be unconstitutional. G.S. 14-292.1, G.S. 14-289 and G.S. 14-290.

2. **Constitutional Law § 23.4; Gambling § 3— lottery—differentiation between commercialized gambling and lotteries by religious and charitable organizations**

The legislature could reasonably determine that commercialized gambling for profit is typically conducted in such a manner as to threaten the public order and morals, and seek to suppress it, while allowing religious and charitable organizations to conduct bingo games and raffles without violating the due process rights of individuals such as those of defendant who was charged with advertising a lottery in violation of G.S. 14-289 and dealing in a lottery in violation of G.S. 14-290.

3. **Constitutional Law § 20.1; Gambling § 3— certain provisions of gambling laws unconstitutional**

The statutory provision permitting homeowner or property owner associations to conduct bingo games or raffles bears no rational relation to the

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purposes of the gambling prohibition or the charitable exemption, and had the effect of treating similarly situated persons and groups differently, without a rational basis for such differential treatment thereby making it inconsistent with the constitutional guaranty of equal protection contained in Art. I, § 19 of the North Carolina Constitution. Furthermore, the portion of G.S. 14-292.1(d) requiring the exempt organization facilities financed by bingo or raffle proceeds to be made available for use by the general public "from time to time" is simply insufficient to prevent the grant of this special gambling privilege from violating the Exclusive Emoluments Clause of the North Carolina Constitution. Art. I, § 32 of the North Carolina Constitution.

Judge PHILLIPS dissenting.

APPEAL by the State from *Smith, Special Judge*. Order entered 28 July 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 13 April 1983.

Defendant, William Frank McCleary, was charged in separate warrants with the offenses of advertising a lottery, G.S. 14-289, and dealing in a lottery, G.S. 14-290. Defendant was convicted of both offenses in Gaston County District Court on 16 April 1982. Defendant appealed his conviction to Superior Court, where he moved for dismissal of the charges against him. On hearing the motion, the court dismissed the warrants containing the charges and declared that G.S. 14-292.1 was unconstitutional on equal protection and due process grounds because it arbitrarily allowed certain classes of citizens to engage in the activities for which defendant has been arrested. The State appealed the dismissal.

Attorney General Rufus L. Edmisten, by Jo Ann Sanford, Special Deputy Attorney General, and Steven F. Bryant, Assistant Attorney General, for the State.

Gingles and Hamrick, by Ralph C. Gingles, for defendant appellee.

JOHNSON, Judge.

This appeal involves a constitutional challenge to the statutory scheme embodied in G.S. Chapter 14, Article 37, regulating lotteries and gambling, and exempting certain types of organizations from the general prohibitions against these activities. The constitutionality of this exemption presents a question of first impression under Article 37. While the prohibition against dealing in a lottery contained in G.S. 14-290 dates back to

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the early nineteenth century, the exemption for the organizations listed in G.S. 14-292.1 is of recent origin, dating back only to 1979. See Session Laws, 1979, c. 893, s. 2.¹ For the reasons set forth more fully below, we conclude that the provisions of G.S. 14-292.1, with one exception, do not violate the constitutional guarantees of due process and equal protection, and that the trial court erred in dismissing the warrants against defendant pursuant to G.S. 14-289 and G.S. 14-290.

G.S. 14-289, which prohibits the advertising of lotteries, contains an exception that excludes from its terms lawful raffles conducted pursuant to G.S. 14-292.1. G.S. 14-290, which prohibits dealing in lotteries, contains identical language. G.S. 14-292.1 allows certain exempt organizations to hold, and individuals to participate in, raffles or bingo games so long as they are conducted according to its terms. The definition of an "exempt organization" in subsection (b)(1) contains the following requirements:

1. The organization has been in continuous existence in the county of operation of the raffle or bingo game for at least one year, AND

2. The organization is exempt from taxation under

- A. Sections 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), 501(c)(19), or 501(d) of the Internal Revenue Code OR

- B. Is exempt under similar provisions of North Carolina General Statutes [G.S. 105-130.11] as a bona fide nonprofit charitable, civic, religious, fraternal, patriotic or veterans' organization or as a nonprofit volunteer fire department, or as a nonprofit volunteer rescue squad or a bona fide homeowners' or property owners' association. (If the organization has local branches or chapters, the term "exempt organization" means the local branch or chapter operating the raffle or bingo game.) (Spacing and letters added.)

1. In the 1983 Session of the General Assembly of North Carolina a bill entitled "An Act to Clarify, Restrict and Amend the Law Relating to the Operation of Bingo Games and Raffles" was passed into law. Effective 1 October 1983, the new law repeals G.S. 14-292.1 and replaces it with "Part 2" of Article 14. For purposes material to this appeal, the clarified statute represents no substantial change in the law.

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The remainder of G.S. 14-292.1 contains detailed provisions regulating the manner in which lawful bingo games and raffles must be conducted. Subsection (b)(3) defines "raffle" as a lottery in which the prize is won by random drawing of a name or number of a person purchasing chances. Subsection (c) provides that the exempt organization must display a "determination letter" from the Internal Revenue Service or the North Carolina Department of Revenue "that indicates that the organization is an exempt organization."²

Subsection (d) details the uses for which exempt organizations may expend the bingo or raffle proceeds. "Authorized expenditures" include expenses incurred in the operation of the bingo games or raffles. Subsection (d) states further that all proceeds remaining after the authorized expenditures shall inure to the exempt organization to be used in either of two basic ways:

- (1) For religious, charitable, civic, scientific, testing for public safety, literary, or educational purposes, OR
- (2) For purchasing, constructing, maintaining, operating or using equipment or land or a building or improvements thereto owned by and for the exempt organization and used for civic purposes or made available by the exempt organization for use by the general public from time to time or to foster amateur sports competition or for the prevention of cruelty to children or animals, provided that no proceeds shall be used or expended for social functions for the members of the exempt organization.

The State presented no evidence during the hearing conducted in Superior Court on the defendant's motion to dismiss the charges. The only facts of record concerning defendant are contained in the allegations in the two warrants. They are as follows: On or between 21 September and 12 October 1981, defendant McCleary published an account of a lottery by means of a printed circular and an advertisement in a local Gaston County newspaper-

2. Under the 1983 amendment to Article 37, a specific licensing procedure is established. G.S. 14-309.5 provides that it shall be a Class H felony for any person to operate a raffle or bingo game without a license. G.S. 14-309.7(a) provides that any exempt organization desiring to obtain a license to operate bingo games or raffles shall make application to the Department of Revenue.

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er stating how, when and where the lottery was to be drawn. The contest was to be for a three bedroom brick home with fireplace, central air, oil heat, and two full baths. Entry into the contest required a "donation" in the amount of \$25.00, to be made to "McCleary Enterprises," Rt. 2, Box 343, Bessemer City, N.C. The contest would end at 12 midnight on 28 February 1982, with the drawing to be held on 10 March 1982 at 10:00 a.m., on the prize house premises located off I-85 and 29, less than one mile from the Kings Mountain city limits in Gaston County. The foregoing activity was alleged to violate G.S. 14-289. The second warrant alleged that on or about 21 September 1981, defendant opened, carried on and promoted, publicly and privately, a lottery, and by advertisement attempted to sell a house by means of a lottery, the contest winner to receive a three bedroom brick home in return for a \$25.00 donation, in violation of G.S. 14-290. The defendant was arrested on 17 November 1981 and subsequently convicted of these offenses in the District Court.

The charges against defendant were dismissed by the Superior Court judge on the grounds that "to prosecute this defendant while not prosecuting those persons, groups or classifications exempted in [G.S.] 14-292.1 would in effect amount to a denial of due process and equal protection in violation of Article I, Section 19 of the Constitution of North Carolina and the Fifth and Fourteenth Amendments to the Constitution of the United States." The court ordered the warrants against the defendant dismissed, and declared G.S. 14-292.1 unconstitutional. On appeal, the State contends that General Statutes 14-289, 14-290, and 14-292.1 do not violate either the due process or equal protection provisions of the state and federal constitutions.

[1] Prior to our discussion of the merits of the State's appeal, we note that even if the trial court were correct in its determination that G.S. 14-292.1 was unconstitutional, it would have been error to dismiss the warrants against defendant. It is a general rule of statutory construction that whether the valid and invalid parts of a statute are separable is a question of legislative intent, and when unconstitutional excepting provisions can be removed without altering the basic prohibitions of the statute, they alone may be voided, leaving the general prohibition intact. See *U.T. Inc. v. Brown*, 457 F. Supp. 163, 170 (W.D.N.C. 1978). See generally 82 C.J.S., Statutes, § 93 c. The valid part of a statute will be sus-

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tained if the valid and invalid parts are not so intimately connected or interdependent as to raise the presumption that the legislature would not have enacted the one without the other. *Id.* at p. 156.

G.S. 14-292.1 constitutes a distinct exception to the general and long standing prohibitions of G.S. 14-289 and G.S. 14-290. The statutory provisions are clearly separable in purpose, and we find it safe to assume that legislature would have retained the general gambling or lottery prohibitions as operative in the event that the charitable exemption was judicially determined to be unconstitutional. Indeed, G.S. 14-292.1 contains a severability clause as to any invalid provision within the exemption itself. Session Laws 1979, c. 893, s. 8. We also note that the recently clarified statutes regulating bingo games and raffles contain a provision automatically repealing G.S. 14-292.1 and the new "Part 2" of G.S. Chap. 14, Article 37 in the event that it is judicially determined "that the General Assembly may not constitutionally allow 'exempt organizations' as defined herein to conduct bingo or raffles, while denying that privilege to all other persons." Session Laws 1983, c. 896, s. 5.1. It was unreasonable to assume, as the trial court evidently did, that the legislature intended to allow *all citizens* to conduct lotteries if it were determined that the charitable exemption as a whole was invalid on due process and equal protection grounds. Thus, in any event, dismissal of the warrants against defendant was error.

DUE PROCESS

[2] The State submits that the statutes in question do not violate the defendant's due process rights because the gambling exemption is "a reasonable regulation under the police power in that it sought to promote religious and other charitable purposes by allowing such organizations to raise revenues through raffles and bingo games." The defendant asserts that "the State has unreasonably obstructed his right to earn a livelihood by only permitting certain exempt organizations to engage in the conduct of operating raffles and bingo games." Further, that "raffles and bingo games are not inherently deleterious to the health, morals, safety and general welfare of society, and that the denial of defendant's right to engage in these activities is an invalid exercise of the State's police power." In addition, defendant argues that

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the denial of his right to conduct a raffle or lottery is "wholly irrelevant to the achievement of the State's objective" and is therefore unreasonable and arbitrary.

The Fifth and Fourteenth Amendments to the United States Constitution, together with the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, provide that no person shall be deprived of life, liberty or property without due process of law. These provisions, however, do not have the effect of overriding the power of state and local governments to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community. *Assoc. of Licensed Detectives v. Morgan, Attorney General*, 17 N.C. App. 701, 195 S.E. 2d 357 (1973). An exertion of the police power inevitably results in a limitation of personal liberty and legislation in this field is justified only on the theory that the social interest is paramount. *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949). Whether it is a violation of the Law of the Land Clause (Article I, § 19) or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. *In re Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973); *Assoc. of Licensed Detectives v. Morgan, Attorney General*, *supra*.

In *State v. Ballance, supra*, the Supreme Court stated that the constitutional guaranty of liberty embraces the "right of the citizen to be free to use his faculties in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation. . . ." 229 N.C. at 769, 51 S.E. 2d at 734. The right to work and earn a livelihood has also been recognized as a property right that cannot be taken away except under the police power of the State in the paramount public interest in *Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851 (1957). The rule is that a statute or ordinance which curtails the right of any person to engage in any occupation can be sustained as a valid exercise of the police power only if it is reasonably necessary to promote the public health, morals, order, safety or general welfare. *Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968). The statute must have a rational, real, or substantial relation to the legitimate governmental purpose and must be reasonably necessary to promote the accomplishment of a public good, or prevent the infliction of a public harm. *State v. Ballance*,

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supra. "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Lawton v. Steele*, 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385, 388-389 (1894). When, however, the legislative body undertakes to regulate a business, trade, or profession, the courts will assume it acted within its powers until the contrary appears. *Cheek v. City of Charlotte*, *supra*; *Roller v. Allen*, *supra*.

The record is not entirely clear as to precisely what right defendant was allegedly deprived of by operation of the charitable exemption. That is, whether defendant sought to earn his livelihood from the proceeds of his lottery, making that his "profession" or "occupation," or whether defendant is a private homeowner seeking to sell his own home in a depressed economy by a novel means of real estate marketing and financing. However, in his brief defendant urges that his right to earn a livelihood has been impaired. Therefore, it will be assumed that the only interest impaired by the operation of the gambling statutes is defendant's interest in conducting a lottery for his personal gain.

The defendant's claim to unconstitutional impairment of his right to earn a livelihood from lottery proceeds is considerably undercut by the fact that there is no constitutional right to gamble, and it is generally held that the law may rightfully regulate or suppress gambling without interfering with any of those inherent rights of citizenship which it is the object of government to protect and secure. *Lewis v. United States*, 348 U.S. 419, 99 L.Ed. 475, 75 S.Ct. 415, *reh. denied*, 349 U.S. 917, 99 L.Ed. 1250, 75 S.Ct. 602 (1955); *Marvin v. Trout*, 199 U.S. 212, 50 L.Ed. 157, 26 S.Ct. 31 (1905). See generally 38 Am. Jur. 2d, Gambling, § 10, p. 116-117 (1968).

It has long been held in North Carolina that the legislature, through the exercise of its police power, may prohibit or regulate gambling. *State v. Felton*, 239 N.C. 575, 80 S.E. 2d 625 (1954); *Taylor v. Racing Assoc.*, 241 N.C. 80, 84 S.E. 2d 390 (1954); *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49 (1938); *State v. Lipkin*, 169 N.C. 265, 84 S.E. 340 (1915). Lotteries are a form of gambling, as that term is defined under the law. *State v. Lipkin*, *supra*. See also G.S. 14-292 (making gambling for money or property a misde-

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meanor). The various gambling prohibitions have heretofore been understood as expressions of a state policy to suppress and prohibit gambling as a business, "the tendency of which, as shown by experience, is to weaken or corrupt the morals of those who follow it, or to encourage idleness, instead of habits of industry. . . ." *Calcutt v. McGeachy*, *supra*, at 7, 195 S.E. 2d 53, quoting, *Ex Parte O'Shea*, 11 Cal. App. 568, 105 P. 776, 777 (1909). In *State v. Lipkin*, *supra*, the Supreme Court upheld G.S. 14-290 against the defendant's constitutional challenge on the following grounds:

"Like any other species of gambling, lotteries have a pernicious influence upon the character of all engaged in them. This influence may be as direct and the immediate consequences as disastrous as in some kinds of gambling which rouse the violent passions and stake the gambler's whole fortune upon the throw of a die."

* * *

They are both intended to attract the player to the game, and have practically the effect of inducing others, by this easy and cheap method of acquiring property of value, to speculate on chances in the hope that their winnings may far exceed their investment in value. This is what the law aims to prevent in the interest of fair play and correct dealing, and in order to protect the unwary against the insidious wiles of the fakir or the deceitful practices of the nimble trickster.

169 N.C. at 272-273, 84 S.E. at 343-344, quoting *Thomas v. People*, 59 Ill. 160. Thus, it is clear that gambling is a proper subject for either complete prohibition or conditional regulation under the police power. It is also evident without need of citation that the promotion of general charitable, civic, educational and public safety purposes is a proper object of legislation.

By enacting G.S. 14-292.1, the legislature chose to legalize and regulate two forms of gambling—bingo games and raffles. Notwithstanding the fact that defendant has no constitutional right to gamble, he does have a constitutional right to fair and impartial laws. However, it is also clear that the extent of the police power to regulate legalized gambling is altogether of a greater

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degree than it would be to regulate other innocuous, traditionally "lawful" trades, occupations or money-making schemes. Accordingly, the legislature could reasonably conclude that the marginal liberty or property interest of individuals seeking to conduct gambling activities for personal profit was outweighed by the degree of public benefit to be derived from bingo games and raffles conducted by regulated nonprofit religious, charitable or civic organizations raising revenues for statutorily designated purposes.³ We are unable to conclude that the basis for enacting a charitable exemption from the general prohibition against gambling is so lacking in rationality as to deny defendant due process of law under either the state or federal constitutions. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461 (1955) (state law prohibiting opticians from fitting frames and replacing broken eyeglasses upheld against Fourteenth Amendment due process challenge on grounds that law has a rational relation to a legitimate state interest⁴) and *Assoc. of Licensed Detectives v. Morgan, Attorney General*, *supra* (state law pro-

3. Subsection (d) of G.S. 14-292.1 contains a provision expressly authorizing religious organizations to use gambling proceeds for *religious purposes*. Furthermore, the State in its brief repeatedly argues that the legitimate state purpose behind the exception was to *promote charitable and religious purposes*. We have serious doubts as to the constitutionality of a law whose primary purpose and effect would be to *aid religion* by the grant of a special privilege to conduct revenue raising activities denied the public at large, the proceeds of which are used for *religious purposes*, such as the training of ministers or the buying of Bibles. It would appear that such a law would be one "respecting an establishment of religion" in violation of the First Amendment to the United States Constitution and Article I, § 13 of the North Carolina Constitution. However, the Establishment Clause issue is not properly before this Court at this time because it did not form the basis of the trial court's order dismissing the warrants against defendant, and was not otherwise directly addressed by either the defendant or the State in their briefs. Furthermore, in view of the severability of the provisions of G.S. 14-292.1, see discussion *infra*, we need not reach this issue in order to resolve the appeal before us. We note this troubling feature of the statutory exemption only in passing, inasmuch as the State repeatedly based its arguments in support of the challenged legislation on a rationale of questionable constitutionality.

4. We note that a similar law was enacted in North Carolina and challenged as violating the Law of the Land Clause. Our Supreme Court, upon reviewing the evidence, held the law unconstitutional on the grounds that there was no rational basis to support the prohibition in light of the fact that an optician is as capable of rendering these services as an optometrist. *Palmer v. Smith*, 229 N.C. 612, 51 S.E. 2d 8 (1948). However, even under the somewhat more "active" review of substantive rationality under Article I, § 19, we find no due process violation in the exemption to the gambling prohibitions.

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hibiting a special policeman from holding an incompatible second office upheld against challenge under Law of the Land Clause in Article I, § 19).

However, defendant has raised a serious question as to whether the charitable exemption so seriously undermines the legislative purpose in prohibiting gambling as an inherently injurious or immoral activity as to bear no rational relationship to that purpose, thereby rendering the statutes violative of due process. In other words, if lotteries or bingo games injure public morals at all, they injure them the same whether conducted by defendant or by one of the exempt organizations, and conversely, if lotteries or bingo games may be conducted by those organizations without injury to the public, the same is true of a regulated lottery conducted by the defendant. The thrust of this argument is that by enacting G.S. 14-292.1, the legislature has impliedly modified the policy that gambling by lottery or bingo is inherently injurious to public morals and order and, as modified, the policy admits of no rational distinction between a lottery conducted by defendant or by a fraternal or civic organization.

The foregoing argument is, in essence, a companion argument to defendant's equal protection challenge, and it will be treated more fully under that constitutional provision. However, assuming that not all gambling activities are *inherently injurious* to public morals, and may be considered merely as a type of trade, occupation or fundraising activity, it is well established that if the *manner* in which a trade, occupation or other activity is conducted will probably result in injury to the public order or morals, the police power of the State may lawfully be used to eliminate the hazard. *Cheek v. City of Charlotte*, *supra* at 297, 160 S.E. 2d at 21-22. We conclude that the legislature could reasonably determine that commercialized gambling for profit is typically conducted in such a manner as to threaten the public order and morals, and seek to suppress it, while allowing religious and charitable organizations to conduct bingo games and raffles without violating the due process rights of individuals such as defendant McCleary.

EQUAL PROTECTION

[3] Although the operation of gambling activities and the promotion of charitable and civic institutions and purposes are proper

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subjects for regulation under the police power, such regulation may not arbitrarily discriminate between similarly situated persons or organizations. Rather, the regulation must be uniform, fair and impartial in its operation. *Cheek v. City of Charlotte, supra*. Where a statute is challenged on the basis that it denies a person equal protection under the law, the level of judicial scrutiny depends on whether the alleged denial involves a fundamental right or a suspect class. *Texfi Industries v. City of Fayetteville*, 301 N.C. 1, 269 S.E. 2d 142 (1980). Defendant argues that the effect of the statute is that in order to lawfully conduct a lottery, he must be a member of one of the organizations with respect to which the statutes he was charged with violating do not apply, thus infringing on his fundamental First Amendment right of free association.

Defendant's contention is inventive, however, it lacks merit. Inasmuch as we have previously found that defendant has no constitutional right to conduct a lottery, the statute does not put him to a waiver of one fundamental constitutional right in order to freely exercise his right not to join one of the exempt organizations. Thus, we find no impairment of a fundamental right. Defendant has not asserted membership in a suspect class nor argued that the statute discriminates on such a basis, and we perceive no basis for his doing so. There being no fundamental right or suspect class involved in defendant's equal protection challenge, the "rational relation" test is appropriate. The question then becomes whether the State may constitutionally allow the "exempt organizations" as defined in G.S. 14-292.1 to conduct bingo or raffles, while denying that privilege to all other persons.

The general rules for determining the constitutionality of legislative classifications are well established. The United States Supreme Court, in discussing the problem of legislative classification in general, has stated that:

[T]he Fourteenth Amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on ground wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted

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within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

McGowan v. Maryland, 366 U.S. 420, 425-426, 6 L.Ed. 2d 393, 399, 81 S.Ct. 1101, 1105 (1961). Our Supreme Court, in *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E. 2d 193 (1971), *cert. denied*, 406 U.S. 920, 32 L.Ed. 2d 119, 92 S.Ct. 1774 (1972), stated that the test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. A statute is only void as denying equal protection when similarly situated persons are subject to different restrictions or are given different privileges under the same conditions. *Cheek v. City of Charlotte*, *supra* at 299, 160 S.E. 2d at 23. In other words, the law must not arbitrarily discriminate between those in like situations and the distinctions that provide the basis for the claim that equal protection was denied must bear some rational relation to a legitimate governmental interest.

Defendant contends that the classifications imposed by the statute bear no relation to any governmental interest, that they are arbitrary, and that they unreasonably discriminate between classes of citizens. The State contends merely that the classifications promote "charitable and religious purposes" and therefore bear a rational relationship to the legitimate state interests of promoting public morals and the general welfare. In its brief, the State specifically argues as follows:

The statute sought to grant a limited exception to conduct lotteries to legitimate charitable and religious organizations pursuant to the section's terms while prohibiting individuals from conducting lotteries. The object of the exception was to promote charitable and religious purposes. Moreover, those in the excluded class were treated uniformly. Therefore, the statute was not in violation of equal protection guaranteed by the United States Constitution or the North Carolina Constitution.

Although the State's argument has the virtue of both clarity and brevity, we are not completely persuaded by its reasoning because it fails to address the central question presented by this appeal. That is, whether the legislature may constitutionally

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determine that gambling activities carried on by the exempt organizations are of a different nature, or are typically carried on in a different manner, than those conducted by individuals or groups organized for profit, and accordingly afford them different treatment under the criminal law, for it is clear that special exemptions in gambling prohibitions must be reasonably related to the goals of those prohibitions.

The exemption for bingo games and raffles is available only to the classes of organizations listed. Those are, generally speaking, organizations that (1) have been in continuous existence in the county of operation for at least one year, (2) are exempt from taxation under either the enumerated provisions of the Internal Revenue Code or similar provisions of the North Carolina General Statutes, (3) as bona fide nonprofit charitable, civic, religious, fraternal, patriotic or veterans organizations, or as a nonprofit volunteer fire department or nonprofit volunteer rescue squad or as a bona fide homeowners' or property owners' association.

The basic goal of the exemption must be seen as permitting established organizations that are required by law to have a general nonprofit charitable or civic orientation to raise revenues for charitable and civic purposes as well as to perpetuate themselves so that they may carry out these functions. With two exceptions that will be discussed *infra*, the classes of organizations contained in G.S. 14-292.1 are reasonably related to that goal. The organizations exempt from taxation under Internal Revenue Code Sections 501(c)(3), 501(c)(4), 501(c)(8), 501(c)(10), 501(c)(19) and 501(d) and under the similar provisions of G.S. 105-130.11 are all required by law to have a general charitable, religious, civic or educational purpose or orientation. In general, it is required either that no part of the net earnings of these organizations inure to the benefit of any private member, individual, or stockholder or that the group not be organized for profit.

We find that the distinction made between individuals and organizations conducting lotteries for personal profit and the exempt organizations, which, by virtue of their legal status, are not allowed to profit from their activities except in such a way as to promote purposes and goals that proceed from charitable, civic or altruistic motivations is a reasonable one and that it bears a ra-

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tional relation to the purpose of the gambling prohibitions in general. The reasons traditionally cited for prohibiting gambling fall into two basic categories: (1) that the activity is inherently immoral or that it tends to weaken morals and encourage idleness, *Calcutt v. McGeachy, supra* and (2) that the unwary public needs to be protected from the unscrupulous operator, *State v. Lipkin, supra*. The legislature in 1979 could reasonably have concluded that bingo games and raffles are not inherently immoral, and that they do not have a totally pernicious influence on the character of the player. Further, that the player's motivation of personal gain through gambling is tempered by the knowledge that his or her "donation" is going to generally charitable or public service purposes. In addition, it could reasonably be determined that the consequences to society are not the same as those where the profit goes to commercialized gambling, or that the danger to society is different from that posed by professional gambling inasmuch as the game operator is, for example, a regulated charitable or religious organization and not a "fakir" or "nimble trickster." See *State v. Lipkin, supra*.

Instructive on the constitutionality of such distinctions under the Fourteenth Amendment is *McGowan v. Maryland, supra*. In *McGowan*, a Maryland "Sunday closing law," which prohibited most, but not all, forms of commercial activity on Sundays was upheld against challenges based on the Due Process and Equal Protection Clauses, the Free Exercise Clause and the Establishment Clause. The defendants were convicted for selling, *inter alia*, a can of floor wax and a toy submarine in their employer's discount department store. The United States Supreme Court held constitutional a distinction made between types of goods and food items that could be sold which, *inter alia*, permitted in a beachside county, the sale of tobacco products, bread, milk, soft drinks, confectionary, fruits, oils, greases, drugs and medicines, while, by necessity, prohibiting the sale of toy submarines, floor waxes, meats and vegetables. The Court reasoned that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day, and so rejected the defendant's arguments that the statutory exemptions were without rational relation to the object of the legislation and that the exemptions rendered arbitrary the

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statute under which they were convicted. 366 U.S. at 426, 6 L.Ed. 2d at 399, 81 S.Ct. at 1105. In *Mobile Home Sales v. Tomlinson*, 276 N.C. 661, 174 S.E. 2d 542 (1970), our Supreme Court, citing *McGowan v. Maryland*, *supra*, upheld an ordinance which prohibited the sale of mobile homes on Sunday but allowed the sale of conventional homes against a challenge under the Equal Protection Clause of Article I, § 17 of the North Carolina Constitution.⁵ The court stated that the determinative question was not whether the difference in treatment was impermissible on the basis that the thing sold is designed for use as a residence in each case, but rather,

The determinative question is whether the legislative body could reasonably conclude that the customary practices and procedures followed in selling mobile homes, not yet located where they are to be used as homes, are substantially more likely to impair Sunday as a day of general rest and relaxation than are the customary practices and procedures followed in selling homes already built upon the lots on which their owners will live in them.

276 N.C. at 670-671, 174 S.E. 2d at 549. The court found that more or less continuous traffic movement, congestion and noise were likely to be a recurrent feature at a mobile home lot, but not at the site of a fixed location conventional home sale, and ruled that the difference in treatment for the latter class was rationally related to the purpose of the Sunday sale prohibitions.

In general, state legislatures may distinguish between classes of persons falling under the prohibitions of a criminal statute, provided that the class selected is identified in terms which clearly show that persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control without violating the Equal Protection Clause of the Fourteenth Amendment. See *Peterson v. Gaughan*, 404 F. 2d 1375 (1st Cir. 1968). Similarly, exemptions to criminal prohibitions may be sustained where the class exempted bears a rational relationship to, and is not inconsistent with, the purpose of the prohibitions. Thus, a classification contained in a

5. Article I, § 17 was re-enacted as Article I, § 19 in 1970.

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Utah statute which provided that it would be an affirmative defense to prosecution for distribution of pornographic materials if the distribution was restricted to institutions or persons having scientific, educational, governmental, or other similar justifications for possessing the pornographic material withstood an equal protection challenge in *Piepenburg v. Cutler*, 649 F. 2d 783 (10th Cir. 1981). See also *U. T. Inc. v. Brown*, *supra*, 457 F. Supp. at 167 (no equal protection violation in that portion of an ordinance of the City of Gastonia prohibiting the commercial exploitation of obscenity which allowed the exhibition of constitutionally unprotected art which was not for sale at the time of the exhibition, but prohibited the exhibition of obscene material in exchange for an admission fee).

Legislative authorization for bona fide nonprofit charitable and civic organizations to conduct bingo games and raffles is no different in principle from the foregoing statutory exemption for permissible uses of obscene materials. Our research discloses that courts in some jurisdictions have upheld similar statutory exemptions on the rationale that gambling is a business, "not so completely fraught with social evils permitting almost unfettered legislative regulation," so that it may be only partially proscribed so long as the basis for the partial proscription has a reasonable relationship to the regulated activity. *State v. Gedarro*, 19 Wash. App. 826, 579 P. 2d 949 (1978).

Underlying the Gambling Act, and consonant with the legislative recognition that professional gambling is interrelated with organized crime, are policies which attempt to restrain personal profits realized through professional gambling activities and to discourage participation in such activities. RCW 9.46.030 is consistent with the state's interest to suppress moral decay and criminal propensities that accompany professional gambling because (1) it permits the public to engage only in pastimes that tend more toward amusement than profit, and (2) it promotes the public interest in supporting charitable activities, thus differentiating between gambling for profit and professional fund raising by a bona fide charitable organization. The statutory regulations afford the state an opportunity to scrutinize the activities of the charitable organizations and licensed individuals to ensure their eligibility pursuant to the statutory scheme.

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579 P. 2d at 951. In *Jamestown Lions Club v. Smith*, 45 Ohio Ops. 157, 100 N.E. 2d 540 (1951), the court upheld a similar statute and, in passing, observed that when bingo and other games of chance are conducted by clubs, lodges, societies, or churches for the benefit of charitable purposes and public benefit causes, they do no harm, but in fact might do a great deal of good. *See also Carroll v. State*, 361 So. 2d 144 (Fla. 1978) (general thrust of the classification allowing nonprofit and veterans' organizations to conduct bingo games is that the proceeds are donated to charitable, civic, community, benevolent, religious, scholastic or similar endeavors for the general welfare, removing bingo profits from the purview of organized gambling). *See generally* Anno., 42 A.L.R. 3d 663 (1972) and Anno., 103 A.L.R. 875 (1936). Thus, as we stated earlier, the legislature could reasonably conclude that although the activity in each instance is, nonetheless, gambling, the customary practices of commercialized or professional gambling are substantially more likely to adversely affect the public order and morals than those attendant to bingo games and raffles or lotteries conducted by nonprofit, charitably oriented organizations.

Defendant attempts to support his charge of arbitrariness by pointing out that certain types of organizations exempt from income taxes by the provisions of Internal Revenue Code, 26 U.S.C. § 501(e), referred to in G.S. 14-292.1, are not similarly exempted by that statute. Defendant argues that organizations such as business leagues, Chambers of Commerce, real estate boards and other organizations included in 501(c) would not, under G.S. 14-292.1, be allowed to conduct lotteries. This argument ignores the basis for the legislative choice between the types of nonprofit organizations eligible for tax-exempt status under the Internal Revenue Code, 26 U.S.C. § 501(c). The distinction made between Section 501 tax-exempt organizations for purposes of the bingo and raffle exemption rests on the general charitable, civic, benevolent, fraternal or patriotic nature of the organizations permitted to conduct gambling activities. The excluded nonprofit organizations defendant points to are not so oriented, and would not be rationally related to the State's purpose in enacting G.S. 14-292.1.

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Next, we address the concern voiced by defendant that the statute fails the rational relation test in that the organizations may use the money generated by lotteries,

for purchasing, constructing, maintaining, operating or using equipment or land or a building or improvements thereto owned by and for the exempt organization and used for civic purposes or made available by the exempt organization for use by the general public from time to time, or to foster amateur sports competition . . .

G.S. 14-292.1(d). While it is true that the statute allows for money to be spent in a way that appears to be self-serving and not in furtherance of a legitimate state interest, this argument overlooks the fact that these organizations are required by law to have a general charitable or civic orientation. The charitable and altruistic purposes of such organizations are capable of being furthered as much by the provision or maintenance of facilities in which to conduct these activities as by direct donations to the causes they promote. Furthermore, facilities so financed are required to be either used for civic purposes or made available to the public "from time to time," thereby insuring that the public derives some direct benefit from all fundraising lotteries. If, as defendant contends, this provision allows for misapplication of funds or other abuse of the privilege of conducting a lottery, those concerns are better addressed, and the goals of the state better served, by more vigorous enforcement of the law, rather than by judicial invalidation of it. Thus, we hold that the distinction drawn between nonprofit organizations that may conduct lotteries for charitable or civic purposes and those that cannot conduct lotteries for private gain is constitutionally permissible, and does not violate the equal protection provision of either the state or federal constitutions.

The foregoing discussion of the legislative goal to promote bona fide nonprofit charitable, civic, religious, fraternal, patriotic or veterans' organizations, or nonprofit volunteer fire departments or rescue squads and their *public works* leads to the inescapable conclusion that the provision of the statute exempting a "bona fide homeowners' or property owners' association" is unconstitutional class legislation. Inasmuch as the legislature chose to allow the exempt organizations to use the proceeds for their

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own purposes, in order to meet the defendant's equal protection challenge, the very existence of such organizations must be seen to benefit the public welfare in some direct manner.

G.S. 105-130.11(a)(11) (Cumm. Supp. 1983) defines the exempt "bona fide homeowners' or property owners' associations" as follows:

Corporations or organizations, such as *condominium associations, homeowner associations, or cooperative housing corporations not organized for profit, the membership of which is limited to the owners or occupants of residential units in the condominium, housing development or cooperative housing corporation, and operated exclusively for the management, operation, preservation, maintenance or landscaping of the common areas and facilities owned by such corporation or organization or its members situated contiguous to such houses, apartments or other dwellings or for the management, operation, preservation, maintenance and repair of such houses, apartments or other dwellings owned by the corporation or organization or its members, but only if no part of the net earnings of such corporation or organization inures (other than through the performance of related services for the members of such corporation or organization) to the benefit of any member of such corporation or organization or other person.*

The privilege to conduct a bingo game or raffle by private homeowner associations whose sole purpose is the landscaping of the common areas and facilities owned by such an association or its members has no relation whatsoever to the basic goal of the gambling prohibition or charitable exemption; these organizations do not have a general charitable orientation *by nature*, and are not required to so conduct themselves *by law*. The activity of homeowner associations conducting raffles to raise revenue for clubhouse construction or landscaping projects on their private property cannot be rationally distinguished from the activity of defendant conducting a lottery to sell a three bedroom brick home with oil heat or of any other private nonprofit group organized for its own self-serving purposes, which is also excluded by G.S. 14-292.1 from conducting a raffle or lottery.

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In *Cheek v. City of Charlotte, supra*, our Supreme Court held unconstitutional a city ordinance which prohibited a person of one sex from giving a massage to a patron of the opposite sex in massage parlors, health salons, or physical culture studios, but permitted such conduct in barber shops, beauty parlors, Y.M.C.A. and Y.M.C.A. health clubs. The court found that the circumstances under which massage treatments were given in the two types of businesses were substantially similar, and that the classification in the ordinance was purely arbitrary, notwithstanding a presumed factual premise behind the ordinance that massage parlors are a business "where abuses of morality and violations of law may readily exist." 273 N.C. at 297, 160 S.E. 2d at 22. In concluding that the ordinance made a "purely arbitrary selection," the court stated, "It 'has no reasonable relation to the purposes of the law, only serving to mechanically split into two groups persons in like situations with regard to the subject matter dealt with but in sharply contrasting positions as to the incidence and effect of the law.'" 273 N.C. at 299, 160 S.E. 2d at 23, quoting *State v. Glidden Co.*, 228 N.C. 664, 668, 46 S.E. 2d 860, 862 (1948).

We conclude that the statutory provision permitting homeowner or property owner associations to conduct bingo games or raffles bears no rational relation to the purposes of the gambling prohibitions or the charitable exemption, and has the effect of treating similarly situated persons and groups differently, without a rational basis for such differential treatment. Thus, the provision is inconsistent with the constitutional guaranty of equal protection contained in Article I, § 19 of the North Carolina Constitution. Furthermore, Article I, § 32 states: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." The portion of G.S. 14-292.1(d) requiring the exempt organization facilities financed by bingo or raffle proceeds to be made available for use by the general public "from time to time" is simply insufficient to prevent the grant of this special gambling privilege from violating the Exclusive Emoluments Clause of the North Carolina Constitution. See *State v. Felton, supra* (exclusive privilege granted by statute to franchise holder to operate a dog track in consideration of 10% of gross receipts violates equal pro-

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tection and exclusive emoluments or privileges provisions of North Carolina Constitution).

The Editor's Notes to G.S. 14-292.1 indicates that the statute contains a severability clause. Section 8 of Session Laws 1979, c. 893 states as follows:

If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications to the act which can be given effect without the invalid provision or application and to this end the provisions of this act are severable.

We conclude that the invalidity of the provision of G.S. 14-292.1 exempting homeowner and property owner associations from the lottery prohibitions contained in G.S. 14-289 and 14-290 does not affect the other provisions of the act which were the subject of this appellate review, and those provisions of G.S. 14-292.1 may be given full effect. Only the offending provision need be severed from the act as a result of this decision. In all other respects we find defendant's claim that his right to equal protection under the law was violated by the operation of the charitable exemption to be without merit.

Defendant, in his brief, urges upon us other reasons for affirming the trial court's order on either due process or equal protection grounds. We have carefully considered these reasons and found them to be insufficient to support the trial court's order. In sum, we hold that with the exception of the provision relating to homeowner and property owner associations, G.S. 14-289, G.S. 14-290, and G.S. 14-292.1 do not violate the due process or equal protection provisions of either the North Carolina Constitution or the United States Constitution. Accordingly, the order of the trial court dismissing the warrants against defendant is reversed and the cause remanded to Superior Court for a trial on the merits.

Reversed and remanded.

Judge HILL concurs.

Judge PHILLIPS dissents.

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Judge PHILLIPS dissenting.

G.S. 14-289, 14-290, and 14-292.1 make it a crime for anybody except certain exempt organizations to either advertise, conduct or promote gambling in any form, and permit the favored organizations to conduct and promote bingo games twice a week and lotteries or raffles once a month.

In my opinion these statutes improperly discriminate against defendant and everyone else but the exempt organizations, violate the equal protection clauses of the Fourteenth Amendment of the United States Constitution and Article I, § 19 of the North Carolina Constitution, and give the exempt organizations special privileges and emoluments in violation of Article I, § 32 of the North Carolina Constitution.

Since the exemption granted involved neither a fundamental right nor a suspect classification (at least as that term has heretofore been used, though statutes which permit prestigious organizations and their members to do with impunity what others go to jail for are more than suspect to me), the constitutional test that must be applied is whether the difference in treatment the statutes authorize has "a reasonable basis in relation to the purpose and subject matter of the legislation." *Guthrie v. Taylor*, 279 N.C. 703, 714, 185 S.E. 2d 193, 201 (1971), *cert. denied*, 406 U.S. 920, 32 L.Ed. 2d 119, 92 S.Ct. 1774 (1972).

The North Carolina Supreme Court has held that "'Gambling is injurious to the morals and welfare of the people, and it is not only within the scope of the state's police power to suppress gambling in all its forms, but its duty to do so.'" *State v. Felton*, 239 N.C. 575, 581, 80 S.E. 2d 625, 630 (1954). (Quoting 24 Am. Jur. 399, Gaming and Prize Contests, § 3; emphasis added in the Supreme Court's opinion.) Exempting special groups from the general legislative ban against gambling cannot ameliorate the evils that gambling entails. The class of person or organization conducting a lottery is not rationally related to the need to protect people from gambling in all its forms; if lotteries injure public morals, then it makes no difference whether they are operated by the defendant or by a fraternal or religious organization. Indeed, it is utterly irrational to suppose that gambling in any form can be effectively discouraged by statutes that permit the favored few to promote and profit from it.

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The State contends that exempting religious and charitable organizations from the gambling laws serves the desirable and legitimate legislative goal of promoting religious and charitable activities by requiring them to use the proceeds for such purposes. If these statutes in truth did that, they would perhaps violate the constitutional separation of church and state, but they only appear to do that. Though G.S. 14-292.1(d) permits exempt organizations to use lottery and bingo proceeds for "religious, charitable, civic, scientific, testing for public safety, literary, or educational purposes," it also permits the monies to be used

for purchasing, construction, maintaining, operating or using equipment or land or a building or improvements thereto owned by and for the exempt organization and used for civic purposes or made available by the exempt organization for use by the general public from time to time, or to foster amateur sports competition

Allowing a homeowner's association or fraternal group or any other exempt organization to use gambling proceeds to buy themselves a building and grounds as long as they have a basketball court or softball field that is occasionally open to the public no more promotes religious or charitable activity than if the defendant or any other group, or person, was permitted to do the same thing.

Too, since exempt organizations may spend most of their gambling proceeds on themselves, another baleful effect of these statutes is to create a special money-making privilege for the favored organizations. A statute may bar a person from engaging in a business "only if it is reasonably necessary to promote the public health, morals, order, safety, or general welfare." *Cheek v. City of Charlotte*, 273 N.C. 293, 296, 160 S.E. 2d 18, 21 (1968). *State v. Felton*, *supra*, held that the exclusive emoluments provision of the North Carolina Constitution was violated by a law allowing a corporation to run a parimutuel system where 10% of the receipts went to the local government. Article I, § 32 of the North Carolina Constitution states: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." G.S. 14-292.1(d) gives special gambling privileges to exempt organizations without really requiring them to do anything for the public.

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In my opinion the dismissal by the trial court was correct and my vote is to affirm it.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; RUFUS L. EDMISTEN, ATTORNEY GENERAL; PUBLIC STAFF; HENRY J. TRUETT; TOWN OF BRYSON CITY; SWAIN COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE, GRAHAM AND JACKSON COUNTIES, THE TOWNS OF ANDREWS, DILLSBORO, ROBBINSVILLE, AND SYLVA; THE TRIBAL COUNCIL OF THE EASTERN BAND OF CHEROKEE INDIANS; MURIEL MANEY; AND DEROL CRISP v. NANTAHALA POWER AND LIGHT COMPANY; ALUMINUM COMPANY OF AMERICA; AND TAPOCO, INC.

No. 8210UC1034

(Filed 6 December 1983)

1. Electricity § 3; Utilities Commission § 36— electric rates—affiliated utilities—use of energy generated by unified system rather than entitlements under agreements

Where the Utilities Commission found that Nantahala Power Co. and Tapoco, Inc. should be treated as one utility for ratemaking purposes, and where Nantahala, Tapoco, TVA and Alcoa had entered into agreements approved by the Federal Energy Regulatory Commission under which all power generated by Nantahala and Tapoco is to be delivered to TVA, certain annual demand and energy entitlements are granted to Nantahala and Tapoco, and Alcoa, Nantahala and Tapoco are to decide how the power will be divided between Nantahala and Tapoco, the Utilities Commission's use of the amount of energy generated by the unified system in setting Nantahala's rates to its retail customers rather than the energy received as entitlements under the agreements with TVA, Alcoa and Tapoco did not constitute a modification of such agreements and was proper.

2. Electricity § 3; Utilities Commission § 36— electric rates—affiliated utilities—costs of energy—no violation of Commerce Clause

The Utilities Commission's method of determining the retail rates of Nantahala Power Co. on the basis of its percentage of the costs of the energy generated and purchased by the combined Nantahala-Tapoco system did not shift a portion of Nantahala's costs to its Tennessee customers in violation of the Commerce Clause of the U.S. Constitution. Art. I, § 8 of the U.S. Constitution.

3. Electricity § 3; Utilities Commission § 57— independent finding by Utilities Commission—sufficiency of evidence

The Utilities Commission made an independent finding of fact not based on a prior Supreme Court decision in the case that energy demand and entitlement agreements entered into by Nantahala Power Co., Tapoco, Inc., TVA and

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Alcoa resulted in substantial benefits to Alcoa to the detriment of Nantahala's customers, and such finding was supported by the evidence at a rate hearing although there was contrary evidence tending to show that the agreements were fair to Nantahala.

4. Electricity § 3; Utilities Commission § 36— electric rates—affiliated companies—method of roll-in of properties, revenues and expenses

The Utilities Commission was not required by a Supreme Court opinion remanding this case to adopt a method of rolling in the properties, revenues and expenses of Tapoco, Inc. with those of Nantahala Power Co. which acknowledged apportionment agreements entered by Nantahala, Tapoco, TVA and Alcoa as controlling the allocation of costs and benefits in determining Nantahala's retail rates. Nor was the Commission required to make a distinction between firm power and curtailable power.

5. Electricity § 3; Utilities Commission § 36— electric rates—affiliated utilities—roll-in of properties, revenues and expenses—failure to include power purchased by parent company

The Utilities Commission's roll-in of the properties, revenues and expenses of Tapoco, Inc. with those of Nantahala Power Co. for the purpose of determining Nantahala's retail rates was not erroneous because it included the power which Nantahala purchased from TVA but did not include the power which its parent company, Alcoa, purchased from TVA.

6. Utilities Commission § 5— parent corporation as public utility—constitutional-ity of statute

The statute providing for the imposition of public utility status on certain parent corporations, G.S. 62-3(23), is not void for vagueness, since a person of ordinary understanding would know from reading the statute that if a parent corporation controls its wholly owned public utility in such a way that the rates of the utility are affected, this has an effect on the rates and the parent corporation could be found to be a public utility.

7. Utilities Commission § 5— parent corporation as public utility—no delegation of legislative power

The statute providing for the imposition of public utility status on certain parent corporations, G.S. 62-3(23), does not delegate legislative power to the Utilities Commission in violation of Art. I, § 6 of the N.C. Constitution, since the legislature has given the Utilities Commission sufficient guidelines so that if the facts are properly found by the Commission, it does not make policy but carries out legislative policy.

8. Electricity § 3; Utilities Commission § 36— extent of affiliation on rates—sufficiency of finding

A finding by the Utilities Commission that "Alcoa has so dominated certain transactions and agreements affecting its wholly owned subsidiary Nantahala that Nantahala has been left but an empty shell, unable to act in its own self interest, let alone the interest of its public utility customers in North Carolina" was a sufficient finding as to the extent Alcoa's affiliation with Nantahala had affected the rates of Nantahala within the purview of G.S. 62-3(23)c

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so as to support the Commission's order that Alcoa must pay any portion of refunds to Nantahala's customers which Nantahala is financially unable to pay.

9. Electricity § 3; Utilities Commission § 36— electric rates—responsibility of parent corporation for refunds—no retroactive ratemaking

A Utilities Commission order requiring Alcoa to be responsible for a refund to customers of Nantahala Power Co. for a period of time prior to the time Alcoa was held to be a public utility did not constitute retroactive ratemaking.

10. Electricity § 1; Utilities Commission § 5— Tapoco, Inc. as public utility

The Utilities Commission properly found that Tapoco, Inc. is a public utility where the evidence showed that electricity generated by Tapoco is exchanged with TVA for power from TVA, since this constitutes furnishing electricity to TVA for distribution to the public within the meaning of G.S. 62-3(23)b.

11. Electricity § 3; Utilities Commission § 36— electric rates—affiliated utilities—single electric system

The Utilities Commission properly found that Nantahala Power Co. and Tapoco, Inc. constitute a single integrated electric system operated as a coordinated part of the TVA system where the evidence showed that the two companies traded all their generation to TVA and received from TVA entitlements to energy which they divide as they please.

12. Electricity § 3; Utilities Commission § 47— general rate case—notice to parent of possible responsibility for subsidiary's refunds

When Alcoa was held to be a public utility and was made a party to a general rate case, it received adequate notice that it might be held liable for a refund to retail customers of its wholly owned subsidiary, Nantahala Power Co.

13. Utilities Commission § 44— general rate case—prefiling of testimony—time for filing brief

The due process rights of Alcoa in a general rate case involving its wholly owned subsidiary, Nantahala Power Co., were not violated by the Utilities Commission's requirement that Alcoa prefile its testimony prior to the prefiling of the intervenors' testimony and that Alcoa file its brief concurrently with that of the intervenors.

14. Utilities Commission § 36— electric rates—finding concerning affiliated companies—no shifting of burden of proof

Although the Utilities Commission stated in its rate order that it had permitted Alcoa to introduce evidence "to challenge the findings of the Supreme Court" in a prior appeal of the case that Nantahala Power Co. and Tapoco, Inc. constituted a single electric system for ratemaking purposes, the Commission did not improperly shift the burden of proof to Alcoa where there was sufficient evidence to support the Commission's finding that Nantahala and Tapoco constituted a single system for ratemaking purposes without the use of any presumption against Alcoa.

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15. Electricity § 3; Utilities Commission § 36— electric rates—responsibility of parent for subsidiary's refunds—general rate case

A proceeding in which the Utilities Commission found Alcoa to be a public utility and ordered Alcoa to pay any portions of refunds which its wholly owned subsidiary, Nantahala Power Co., is financially unable to pay was properly conducted as a general rate case rather than as a complaint proceeding against Alcoa, since the responsibility of Alcoa for Nantahala's refund was ancillary to the case.

16. Electricity § 3; Utilities Commission § 56— electric rates—order for refunds—compliance with prior Supreme Court decision

The Utilities Commission was following the mandate of the N.C. Supreme Court in a prior appeal of this case in ordering Nantahala Power Co. to "refund to its North Carolina retail customers all revenue collected under the rates approved by the Commission order issued June 14, 1977, to the extent that said rates produce revenue in excess of the rates approved herein."

17. Electricity § 3; Utilities Commission § 36— electric rates—order requiring refunds—no confiscation of property

A Utilities Commission order providing for refunds to Nantahala Power Company's retail customers and requiring Nantahala's parent company, Alcoa, to pay any portion of the refunds which Nantahala is financially unable to pay did not confiscate the property of Nantahala in violation of its due process rights because Nantahala's refund obligation is more than its net worth, Alcoa has denied its obligation to pay, and it may be years before Alcoa has exhausted its remedies in federal court.

APPEAL by respondents from order of North Carolina Utilities Commission entered 2 September 1981. Heard in the Court of Appeals 25 August 1983.

This is an appeal from an order by the North Carolina Utilities Commission reducing rates and requiring a refund by Nantahala Power and Light Company and Alcoa. This case has previously been in the appellate courts. See *Utilities Comm. v. Edmisten, Attorney General*, 40 N.C. App. 109, 252 S.E. 2d 516 (1979), *aff'd in part and rev'd in part*, 299 N.C. 432, 263 S.E. 2d 583 (1980). Nantahala and Tapoco, Inc. are wholly owned subsidiaries of the Aluminum Company of America (Alcoa). Each of them is engaged in the generation of hydroelectric power in western North Carolina. Tapoco sells power to no one but Alcoa for the use of its aluminum manufacturing operations in Tennessee. Nantahala, which was organized in 1929, served the public until 1941 with a small amount of its power going to Alcoa. In 1941 with the advent of World War II, Nantahala accelerated the development

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of its hydroelectric power to serve Alcoa's increased production of aluminum for the war effort. After the war, Alcoa continued buying power from Nantahala but the expanded demand by the public took increasing amounts of Nantahala's generation so that after 1971 Alcoa has not taken any power from Nantahala.

In 1941 Nantahala and Tapoco entered into an agreement with the Tennessee Valley Authority (TVA) known as the Fontana Agreement. Among other things, this agreement provided that the TVA would coordinate the water flow of the dams owned by Nantahala and Tapoco. The agreement was to last for 20 years. In 1962 the Fontana Agreement was replaced by the New Fontana Agreement (NFA). TVA, Alcoa, Nantahala and Tapoco are parties to the NFA. Under the terms of the NFA, all power generated by Nantahala and Tapoco is delivered to TVA. TVA grants to Nantahala and Tapoco annual entitlements to some 1,798,000,000 kwh. The NFA provides that Alcoa, Nantahala and Tapoco will decide how the power will be divided between Nantahala and Tapoco.

In 1963 an agreement was made by the three parties under the terms of which Nantahala was to receive as its monthly share of the NFA entitlements the larger of either its total actual generation or 30,000,000 kwh. This agreement provided further that Alcoa was to pay Nantahala an annual sum of \$89,200 in compensation for allowing TVA to control the flow of water through Nantahala's dams.

In 1971 a new apportionment agreement was made. Under this agreement Nantahala received 360 million kwh annually. The \$89,200 annual payment from Alcoa was eliminated and Nantahala purchased from TVA any additional power it needed for its customers. In 1975, the test year for this case, Nantahala purchased slightly more than 90 million kwh from TVA for which it paid over \$1.5 million dollars. Nantahala generated in excess of 520 million kwh in that year.

The Utilities Commission first refused to join Alcoa and Tapoco as parties and denied a motion to compel Nantahala to produce information sufficient to allow the Commission to consider a rate design based on the "rolling in" of Tapoco's properties, revenues and expenses with those of Nantahala, as though the two were operating as one utility. This Court reversed. Our

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Supreme Court affirmed in part the decision of this Court and ordered the case remanded to the Utilities Commission with directions that it consider whether a rate schedule computed as if Nantahala and Tapoco were one utility would be in the best interests of the customers of Nantahala.

After the remand from the Supreme Court, the Utilities Commission held further hearings. Alcoa and Tapoco were made parties to the proceedings and were held to be public utilities. The Commission found that the NFA and the 1971 Apportionment Agreement have resulted in substantial benefits to Alcoa to the significant detriment of the retail customers of Nantahala, and that the Nantahala and Tapoco systems should be treated as one entity with respect to all matters affecting the determination of Nantahala's reasonable cost of service applicable to its North Carolina retail operations.

In calculating the costs of power to Nantahala's retail customers, the Utilities Commission did not use the NFA or 1971 Apportionment Agreement. It used instead the total generation of Nantahala and Tapoco plus the power purchased from TVA by Nantahala. It allocated Nantahala's share of demand related costs by dividing the total dependable capacity of the two systems plus the power purchased from TVA into Nantahala's peak load during the test year. The result was 24.60% which the Commission assigned to Nantahala as its percent of the total system demand costs. It calculated Nantahala's share of energy related costs by dividing total average energy available from the unified system plus Nantahala's purchase from TVA into Nantahala's energy requirements for 1975. This gave a result of 24.51% which the Commission assigned to Nantahala as its share of energy costs for the unified system.

The Commission ordered that Nantahala reduce its rates and refund to its North Carolina retail customers all revenue collected under the Commission's order issued 14 June 1977 to the extent said rates produced revenue in excess of the rates allowed by the Commission in this proceeding. It ordered further that to the extent Nantahala is financially unable to make the refunds required in the Commission's order, Alcoa shall make such refunds.

Alcoa, Nantahala and Tapoco appealed.

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Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Crisp, Davis, Schwentker and Page, by William T. Crisp and Robert B. Schwentker, for Henry J. Truett, the Counties of Cherokee, Graham, Swain, and Jackson; the Towns of Andrews, Dillsboro, Robbinsville, Bryson City and Sylva; and the Tribal Council of the Eastern Band of the Cherokee Indians.

Robert Fischbach, Executive Director of The Public Staff, by Staff Attorney Thomas K. Austin, for the Using and Consuming Public.

Joseph A. Pachnowski for the Town of Bryson City.

Western North Carolina Legal Services, Indian Law Unit, by Larry Nestler, for Muriel Maney and Derol Crisp.

Fred H. Moody, Jr. for the County of Swain.

Hunton and Williams, by Robert C. Howison, Jr., James E. Tucker, Edward S. Finley, Jr., and William C. Matthews, Jr., for Nantahala Power and Light Company.

LeBoeuf, Lamb, Leiby and MacRae, by Ronald D. Jones and David R. Poe, for Aluminum Company of America and Tapoco, Inc.

WEBB, Judge.

[1] Nantahala and Tapoco first attack the methodology used by the Utilities Commission in establishing the charge to Nantahala's retail customers. They argue that the Commission is required by law to recognize the NFA and the 1971 Apportionment Agreement in setting rates for Nantahala's retail customers. They say this is so because both of these agreements have been filed with and approved by the Federal Energy Regulatory Commission (FERC) and the Utilities Commission is preempted by federal law from ignoring them. The Utilities Commission in setting retail rates has to give effect to wholesale rates established by the FERC. See *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205, 84 S.Ct. 644, 11 L.Ed. 2d 638, *reh'g denied*, *F.P.C. v. Southern California Edison Co.*, 377 U.S. 913, 84 S.Ct. 1161, 12 L.Ed. 2d 183 (1964); *Public Service Co. of Colorado v. P.U.C. of Colorado*, 644 P.

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2d 933 (Colo. 1982); *People's Counsel of D.C. v. P.S.C. of D.C.*, 444 A. 2d 975 (D.C. Ct. App. 1982); *Northern States Power Co. v. Hagen*, 314 N.W. 2d 32 (N.D. 1981); *Narragansett Electric Co. v. Burke*, 119 R.I. 559, 381 A. 2d 1358 (1977), *cert. denied*, *Burke v. Narragansett Electric Co.*, 435 U.S. 972, 98 S.Ct. 1614, 56 L.Ed. 2d 63 (1978); *Citizens Gas Users Ass'n. v. Public Utilities Comm.*, 165 Ohio St. 536, 138 N.E. 2d 383 (1956); *City of Chicago v. Illinois Commerce Comm.*, 13 Ill. 2d 607, 150 N.E. 2d 776 (1958); and *United Gas Corp. v. Mississippi P.S.C.*, 240 Miss. 405, 127 So. 2d 404 (1961). Nantahala and Tapoco contend that when the Utilities Commission, in setting retail rates for Nantahala, refused to use the demand and energy entitlements which Nantahala received under the NFA and the 1971 Apportionment Agreement, the Commission modified these two agreements which it does not have the power to do.

We believe the resolution of this case largely depends on a proper analysis of the NFA and the 1971 Apportionment Agreement as affected by the order of the Utilities Commission. The Commission's order does not change the energy entitlements received by Nantahala and Tapoco under the NFA and the 1971 Apportionment Agreement. Each receives its share of the power and uses it as received. The question is whether by not using these two agreements in setting Nantahala's rates the Utilities Commission has changed the agreements, which it does not have the power to do.

When the Utilities Commission determined that Nantahala and Tapoco should be treated as one company for rate-making purposes, it was faced with the question of what constituted a proper charge to Nantahala's retail customers for the power used by them. The Utilities Commission resolved this question by assigning to Nantahala's retail customers a demand charge based on the percentage used by Nantahala of the firm energy generated and purchased by the unified system during the test year. It calculated the energy charge using the same method, that is, it assigned to Nantahala's customers the percentage needed for their own energy requirements out of the total energy generated and purchased by the unified system.

The amount of energy generated by the unified system was not the same as the energy Nantahala received as entitlements.

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Therefore the question is whether the Commission has changed the NFA and the 1971 Apportionment Agreement by using generation rather than entitlements under the agreements in calculating retail rates for Nantahala. We believe by requiring Nantahala's retail customers to pay demand and energy charges based on Nantahala's percent of the demand and energy requirements from the capacity of the entire system the Utilities Commission has used a methodology we cannot disturb. The methodology calculates the cost of the generation which the unified system trades to TVA for the electricity used by the system. In whatever form the entitlement comes to Nantahala-Tapoco, Nantahala's customers should only be charged for Nantahala's share of the costs of what was traded for the entitlements. We do not believe the methodology used by the Utilities Commission changes the NFA or the 1971 Apportionment Agreement.

Nantahala and Alcoa also argue that Tapoco's four hydroelectric plants have been licensed by the FERC for the express purpose of supplying power to Alcoa's Tennessee operations and that by directing a part of Tapoco's power to Nantahala's customers, the order of the Utilities Commission has imposed a condition on a federal license to operate their plants which it may not do. See *First Iowa Hydro-Electric Cooperative v. F.P.C.*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143, *reh'g denied*, 328 U.S. 879, 66 S.Ct. 1336, 90 L.Ed. 1647 (1946). We do not believe the Commission's order diverts power from Tapoco to Nantahala. The order fixes the costs to Nantahala for the power it receives through the NFA and the 1971 Apportionment Agreement.

[2] Nantahala and Alcoa contend that the order of the Commission places an impermissible burden on interstate commerce in violation of Article I, § 8 of the United States Constitution. The Commission recited in its order that "Nantahala-Tapoco combined system's North Carolina public load has first call on the total electric energy output of the combined system, and to the extent that said output exceeds the requirements of the North Carolina public load, such excess will be available for sale and will be purchased by Alcoa." Nantahala and Tapoco argue that it is a violation of the Commerce Clause to prefer the residents of one state over the residents of another state; and after stating it would do this, the Utilities Commission did so by the methodology it used

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in setting Nantahala's retail rates. They argue that this methodology reduced Nantahala's rates below its costs and shifted these costs to the combined system's Tennessee load.

If the Utilities Commission had used a methodology that gave "first call" to the North Carolina customers it would violate the Commerce Clause. In spite of its recital, we do not believe the Utilities Commission did this. We believe that the methodology used by the Commission allows Nantahala to recover the costs of the percentage of energy it used based on its percentage of the costs of the energy generated and purchased by the combined system. We do not believe this prefers North Carolina customers over Tennessee customers.

Nantahala and Tapoco say that an illustration of the shifting of costs to out-of-state customers may be found in the way the demand cost allocation factor for Nantahala is calculated. Based on Nantahala's peak load which was 24.6% of the total firm capability of the combined system, the Commission assigned 24.6% of the demand costs to Nantahala. Nantahala and Tapoco point out that Tapoco's peak load was only 44.9% of the total firm capability of the combined system. They say that Tapoco is thus required to shoulder 75.4% of the demand costs, 30% more than its responsibility. We believe that in determining Nantahala's reasonable demand cost, the Commission was not required to assure the recovery of 100% of the demand costs incurred in the combined system. Nantahala's customers should not be required to pay more for demand than that for which they are responsible, even if it means that all the combined system demand costs are not recovered. *See Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705 (1972), *superseded by statute*, *Utilities Comm. v. Power Co.*, 305 N.C. 1, 287 S.E. 2d 786 (1982).

Nor do we believe *New England Power Co. v. New Hampshire*, 455 U.S. 331, 102 S.Ct. 1096, 71 L.Ed. 2d 188 (1982) governs this case. It was said in that case that "Our cases consistently have held that the Commerce Clause of the Constitution, Art. I, § 8, cl. 3, precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *Id.* at 338, 102 S.Ct. at 1100, 71 L.Ed. 2d at 197. The facts of that case are distinguishable from this case. In

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that case the Supreme Court held that it was an impermissible burden on interstate commerce for the New Hampshire Public Utilities Commission to require a power company generating hydroelectric power in New Hampshire to sell an amount of power in New Hampshire at hydroelectric rates equal to the amount of hydroelectric power it generated in New Hampshire. In this case the Utilities Commission has set a rate for Nantahala-Tapoco based on the cost of producing the power.

Alcoa argues that it, Nantahala and Tapoco are regulated by TVA; that TVA has approved the NFA and the 1971 Apportionment Agreement, and the Utilities Commission cannot refuse to give effect to these agreements. As we have said, we do not believe the Utilities Commission has refused to give effect to these agreements. It has calculated the costs to Nantahala's customers of the power delivered to them under the agreements.

Alcoa also argues that the relationship between Alcoa, Nantahala and Tapoco is regulated by the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935 and the SEC has granted the companies an exemption from some of the requirements of the Act. We do not believe the order of the Utilities Commission has in any way affected the order of the SEC as to the three companies.

[3] Nantahala assigns error to the Commission's finding of fact that the NFA and the 1971 Apportionment Agreement resulted in substantial benefits to Alcoa to the detriment of Nantahala's customers. Nantahala argues first that the Commission made no finding of fact that the two agreements were unfair to Nantahala's customers but erroneously assumed our Supreme Court had found as a fact that they are unfair. It argues further that the only evidence at the hearing after the Supreme Court's remand is that the agreements were fair. The Supreme Court questioned the fairness of an agreement which required Nantahala to purchase additional power regardless of the adequacy of its own generation. Nantahala's witness testified that the only valid way to compare generation is on an hour-by-hour basis, that a hydroelectric power plant can generate more power than its customers use during a year, but if the power cannot be generated when there is a demand for it, the power generated during the period when it is not needed is useless. Nantahala's

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witness testified this was the case for Nantahala during the test year and for that reason, Nantahala benefited from the firm power it received under the NFA and 1971 Apportionment Agreement. Nantahala also contends that the Commission did not address the evidence that during the 12-month period from June 1980 through May 1981, Nantahala's generation was less than its entitlement under the NFA and the 1971 Apportionment Agreement. Finally, Nantahala contends no consideration was given to the substantial benefits Nantahala's customers have received since 1941 because of the presence of Alcoa. Nantahala argues that the uncontradicted evidence shows that the NFA and 1971 Apportionment Agreement are fair to Nantahala's customers and the Commission should have so found.

We believe the Utilities Commission made an independent finding of fact that the NFA and the 1971 Apportionment Agreement were unfair to Nantahala's customers. We believe a reading of our Supreme Court's opinion in the previous appeal in this case leaves little doubt that they considered the NFA and the 1971 Apportionment Agreement unfair to the customers of Nantahala. We cannot hold because of this, however, that the Commission's finding of fact on this issue, which we believe was supported by the evidence, was not independently made. The Commission did not comment on all the evidence as to the fairness of the two agreements but it was not required to do so.

The Commission relied on evidence that in 1963 an agreement had been made under which Nantahala received a minimum of 360,000,000 kwh annually plus its actual production in excess of 360,000,000 kwh. This allocation was based on engineering studies which showed that under the most adverse water conditions Nantahala could generate 360,000,000 kwh annually with the average energy that could be generated annually to be 439,000,000 kwh per year. Under the 1971 Apportionment Agreement, Nantahala received only 360,000,000 kwh per year. The additional power which Nantahala had received under the 1963 agreement went to Tapoco and was passed on to Alcoa. There was evidence that the peaking capacity allotted Nantahala under the 1971 Apportionment Agreement is less than its actual capacity. This results in Nantahala having to pay a demand charge to TVA when Nantahala's customers demand is less than Nantahala's capacity. Nantahala's dams are upstream from Tapoco's dams. This means

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Nantahala can store water during the winter months and, by releasing it in dry seasons, can provide water for Tapoco. This benefit to Tapoco was not taken into account in the 1971 Apportionment Agreement.

The Commission also relied on evidence that under the 1941 Fontana Agreement, Nantahala gave TVA the right in perpetuity to control the storage and flow of water from its hydroelectric projects. This constituted a loss of considerable value to Nantahala which the TVA recognized in the return entitlements of the NFA. Nantahala was paid \$89,200 per annum by Alcoa for this loss under the 1963 agreement but received nothing for it under the 1971 Apportionment Agreement. There is evidence in the record which shows it is some benefit to TVA for Nantahala to be integrated into the TVA system. TVA recognized this in the NFA but no benefits were given to Nantahala in the 1971 Apportionment Agreement for this right.

There was evidence that the NFA is unfavorable to Nantahala in that it is structured to meet Alcoa's needs and not the needs of Nantahala. This is so because the return entitlement is structured to meet Alcoa's demand for a certain amount of stable electricity for purposes of aluminum production. It is not structured to meet Nantahala's need for peaking capacity which a utility with a public service load requires. Nantahala has a need for assured, but constantly variable amounts. It has this peaking capacity but it does not receive it under the NFA. We believe this evidence supports the Commission's finding of fact that the NFA and the 1971 Apportionment Agreement resulted in substantial benefits to Alcoa to the significant detriment of Nantahala's customers. There was substantial evidence that the two agreements were fair but this evidence was by no means contradicted. We cannot disturb this finding by the Utilities Commission.

[4] Nantahala contends that the Utilities Commission did not adopt a roll-in methodology within the scope of the remand by our Supreme Court. They argue that the Supreme Court envisioned a roll-in methodology which acknowledges the terms of the NFA and the 1971 Apportionment Agreement. Nantahala argues that the Supreme Court intended that the two agreements should be considered as valid and should control on the allocation of costs

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and benefits on all matters to which they applied. Nantahala also argues that the methodology erroneously fails to draw any distinction between the value of firm power on the one hand and curtailable power on the other. Nantahala argues that curtailable power is of almost no value to a utility serving a public load because the public will not accept services that may require even short periods of darkness or lack of heat. Under the 1971 Apportionment Agreement, Nantahala received virtually all the firm power entitlements and Tapoco virtually all of the curtailable entitlements. Tapoco then had to pay TVA in order for TVA not to curtail power to Tapoco. Nantahala argues this should have been taken into account when adopting a roll-in methodology.

We do not agree that the Utilities Commission was required by the opinion of the Supreme Court to use a roll-in methodology that acknowledges the NFA and 1971 Apportionment Agreements as controlling as to costs and benefits. The Supreme Court did not prescribe a formula for a roll-in. In discussing the NFA and the 1971 Apportionment Agreement which the Court felt required Nantahala to purchase extra power for its customers although it generated sufficient power for them, the Court said that to suggest such an arrangement fairly served the customers of Nantahala "assaults the common sense of this Court." In light of this language by the Supreme Court, we do not feel its opinion requires the roll-in to be based on the NFA and 1971 Apportionment Agreement. It is true that the Supreme Court did not consider the federal questions in its opinion. We believe the Utilities Commission stayed within the mandate of the Supreme Court and it violated no federal law in so doing. The Utilities Commission was not required to consider payments made by Tapoco to prevent the curtailment of power because this did not occur in the test year.

Alcoa also contends that the roll-in applied by the Utilities Commission is not in conformity with the opinion of the Supreme Court. Alcoa points out that the Supreme Court's concern was with the fact that Nantahala did not receive the fair economic equivalent of what its generating plants were capable of producing as a result of which Nantahala was forced to purchase expensive TVA power. Alcoa argues that an analysis of the NFA and the 1971 Apportionment Agreement shows that Tapoco and Alcoa did not receive any hidden benefits from them. The unified

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system did not receive as much in the entitlements as the system generated and Alcoa says this is because Nantahala's harvests of energy are neither as regular nor abundant as the Supreme Court was led to believe. This is because there is a substantial mismatch in the times at which the power is generated and the times it is needed. For this reason, TVA was not willing to give an entitlement of firm power equal to the generation of the unified system. Alcoa argues that the analysis which the Commission should have made and failed to do was whether the division of the entitlements between Nantahala and Tapoco was equitable. It says that any study of the division of these entitlements shows that Tapoco fared far worse than Nantahala in that it received less power in return for its contribution than did Nantahala. The Commission did analyze the 1971 Apportionment Agreement as well as the NFA as pointed out in another part of this opinion. It came to the conclusion that they were unfair to Nantahala's customers. We might reach a different conclusion but it is not for us to dictate to the Utilities Commission the weight to give material facts before it. We believe the weight the Commission gave to these facts was within the requirements of the Supreme Court's opinion.

[5] Alcoa also objects to the roll-in because it includes the power which Nantahala purchased from TVA but does not include the power which Alcoa purchased from TVA. We believe the Commission was correct in not considering the power purchased by Alcoa from TVA. The Commission's task was to determine the part Nantahala's retail customers should be required to pay for their share of the energy received by the unified Nantahala-Tapoco system under the NFA and purchased from TVA. They should not be required to pay for energy purchased by Alcoa outside the unified system.

Alcoa assigns error to the Commission's finding that Alcoa is a public utility and its requirement that Alcoa pay any portion of the refunds which Nantahala is financially unable to make. The Utilities Commission found Alcoa to be a public utility pursuant to G.S. 62-3(23)c which provides:

The term "public utility" shall include all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation or subsidiary corporation

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as defined in G.S. 55-2 to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility.

Alcoa attacks this portion of the Utilities Commission's order on three grounds. It says (1) G.S. 62-3(23)c is unconstitutional for vagueness, (2) it constitutes an unlawful delegation of legislative authority, and (3) the Commission misinterpreted and misapplied this section of the statute.

[6] Under the due process clause of the Fourteenth Amendment to the United States Constitution, a statute is void for vagueness if its terms are so vague, indefinite and uncertain that a person cannot determine its meaning and therefore cannot determine how to order his behavior so as to avoid its dictates or avoid its application. See *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939) and *State v. Poe*, 40 N.C. App. 385, 252 S.E. 2d 843, cert. denied, 298 N.C. 303, 259 S.E. 2d 304 (1979), appeal dismissed, 445 U.S. 947, 100 S.Ct. 1593, 63 L.Ed. 2d 782 (1980). Alcoa argues that the legislature has failed to define what the effect on rates or services is necessary to impose public utility status on a parent corporation, and there is thus no guidance for the Commission as to whether Alcoa has had an effect on Nantahala. It argues further that a reading of the statute gives no indication of the parent company actions that the legislature was attempting to control or eliminate. We believe a person of ordinary understanding would know from reading the statute that if a parent corporation controls its wholly owned public utility in such a way that the rates of the utility are affected this has an effect on the rates and the parent corporation could be found to be a public utility. This prevents this section of the statute from being void for vagueness.

[7] Alcoa contends that G.S. 62-3(23)c violates Article I, § 6 of the North Carolina Constitution because it delegates legislative power to the Utilities Commission. It says this is so because it is a legislative decision as to what shall be a public utility and that by enacting this section of the statute, the legislature has allowed the Commission to determine what corporations shall be designated public utilities and how they shall be regulated without adequate legislative standards to guide the Commission. We believe, without discussing all the hypothetical situations that on

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the facts of this case there has not been a delegation of legislative authority. In order to find that Alcoa is a public utility, the statute required the Utilities Commission to find that Alcoa was so affiliated with Nantahala as to have an effect on Nantahala's rates. The Commission so found and we believe this finding was supported by the evidence. We believe that the General Assembly has given the Utilities Commission sufficient guidelines so that if the facts are properly found by the Commission, it does not make policy but carries out legislative policy. By the same token when the Utilities Commission determined that Alcoa is a public utility we believe it was legislative policy and not the Commission's policy under which the Commission required Alcoa to be responsible for a part of the refund.

[8] Alcoa also contends the Utilities Commission has misinterpreted and misapplied G.S. 62-3(23)c. It argues that since the section contains the words "to such an extent," the Commission may only regulate to the extent of the precise impact Alcoa has had on the rates of Nantahala. It argues that the Utilities Commission did not attempt to determine the extent to which Alcoa's relationship with Nantahala has affected Nantahala's rates and services and thus did not comply with the mandate of G.S. 62-3(23)c. Assuming that Alcoa is correct in this argument the Commission found the following: "Alcoa has so dominated certain transactions and agreements affecting its wholly owned subsidiary Nantahala that Nantahala has been left but an empty shell, unable to act in its own self interest, let alone the interest of its public utility customers in North Carolina." We believe this finding by the Commission is sufficient as to the extent Alcoa's affiliation with Nantahala had affected the rates of Nantahala so as to support the order of the Commission.

[9] Alcoa also contends the Commission has engaged in retroactive ratemaking which it does not have the power to do. See *Utilities Commission v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972). It says this is so because the rates established in this proceeding are for the period from July 1977 through August 1981 and Alcoa was not held to be a public utility until October 1980. Alcoa argues that to make it responsible for a refund prior to the time it was declared a public utility is retroactive ratemaking. Retroactive ratemaking occurs when a rate is set so as to permit collection in the future for expenses attributable to past

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services. Alcoa was made responsible for a refund ordered for Nantahala for the period in question in this proceeding. We do not believe that it is retroactive ratemaking for Alcoa to be held responsible for a refund. The fact that it was not made a party to the proceeding until after the remand from the Supreme Court makes no difference.

[10] Tapoco assigns error to the Utilities Commission's finding that it is a public utility. The Commission found that Tapoco was a public utility under G.S. 62-3(23)a which provides a "person" is a public utility if it generates electricity for sale to the public. It also found Tapoco to be a public utility under G.S. 62-3(23)b which provides:

The term "public utility" shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.

The Commission advanced as a third reason for finding Tapoco to be a public utility that it had obtained from the Utilities Commission in 1955 a certificate of public convenience and necessity. The Commission found as a fourth reason for holding Tapoco is a public utility was that its articles of incorporation state that one of its purposes is to produce and provide electric power to the public and provide it with the powers of eminent domain.

We do not decide whether the Commission was correct in holding Tapoco to be a public utility as provided by G.S. 62-3(23)a because it holds a certificate of public convenience and necessity or because its articles of incorporation state that one of its purposes is to generate electricity for sale to the public. We do not believe that determination is necessary for a decision in this case. We believe the evidence is sufficient to find Tapoco is a utility for ratemaking purposes. Tapoco's generation is exchanged with TVA for power from TVA. We believe this constitutes furnishing electricity to TVA for distribution to the public for compensation. This would make Tapoco a public utility for ratemaking purposes. Although the Utilities Commission did not set a rate for Tapoco, the price Tapoco charges for electricity will be affected by the outcome of this case. We hold that for this case Tapoco is a utility for ratemaking purposes and is a proper party to the case.

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Tapoco also contends that the decision of the FERC in *Town of Highlands v. Nantahala Power and Light Company*, 19 F.E.R.C. (CCH) ¶ 61 (14 May 1982), holding that Nantahala and Tapoco should not be treated as one utility for ratemaking purposes, is binding on this Court. The FERC, while holding that it would not roll-in the costs of the two companies, held that the 1971 Apportionment Agreement was unfair in that Nantahala does not receive under it the energy in proportion to its contribution under the NFA. We do not believe the action of the Utilities Commission in this case is inconsistent with the decision of the FERC. The FERC was passing on wholesale rates and did not attempt to set retail rates in North Carolina.

[11] Tapoco argues that the Commission's finding that Nantahala and Tapoco constitute a single integrated electric system operated as such by and as a coordinated part of the TVA system is arbitrary and capricious and not based on substantial evidence. It argues that the evidence shows that the two companies operate independently of each other, that they serve different customers and are regulated by different agencies. Finally, Tapoco argues that the historical development of the two companies is such that they cannot be considered one integrated system. These facts may have been sufficient for the Commission to have found that the two companies were not a single, integrated electric system but there were other facts. The two companies traded all their generation to TVA and received in exchange for this entitlements of energy which they divide as they please. We believe the Commission could conclude from these facts that the two companies constitute a single, integrated system for ratemaking purposes.

Tapoco also argues the Commission did not properly consider the evidence because it gave too much weight to what it called the findings of the Supreme Court. Tapoco points out that the Supreme Court cannot make findings of fact and for the Utilities Commission to refer to findings by the Court, which "findings" were made before Tapoco was a party to the proceedings is error. Tapoco argues that no weight should be given to this language of the Supreme Court. Although the Utilities Commission referred to some of the statements in the Supreme Court's opinion as findings we believe the Commission made its own findings based on competent evidence which we cannot disturb.

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Finally, Tapoco argues that it was denied due process of law in the manner in which the hearing was conducted. It contends that it was entitled to notice as to the effect of holding it to be a public utility. It says that to hold it to be a public utility without defining what its duties would be in the future, thus leaving it with a Damoclean sword over its head, deprives it of due process. We have affirmed the holding of the Utilities Commission to the extent that Tapoco is held to be a public utility for purposes of this case and bound by any order entered in this case. We do not believe this leaves a Damoclean sword over the head of Tapoco.

[12] Alcoa argues that it was denied due process for several reasons. It says first that it was not given adequate notice of what it would be required to defend. It contends it was not put on notice that it might be required to be responsible for a part of the refund until the issuance of the Commission's order on 2 September 1981. Alcoa argues that the failure to be notified of what the issues would be deprived it of due process of law. *See Morgan v. United States*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938). In this case Alcoa was made a party to the proceedings and held to be a public utility by order of the Commission on 3 October 1980. We believe that when Alcoa was held to be a public utility and made a party to a general rate case this was adequate notice that it might be held liable for the refund.

[13] Alcoa also contends its due process rights were violated by requiring it to prefile its testimony prior to the prefiling of the intervenors' testimony and requiring it to file its brief concurrently with the intervenors. It argues that it had a right to know what the contentions of the intervenors would be with a chance to meet them which it did not have under the procedure used by the Utilities Commission. Alcoa argues that it did not know the position of the intervenors as to the hidden benefits to Alcoa under the NFA and the 1971 Apportionment Agreement until the intervenors' brief was filed with the Utilities Commission at which time it did not have a chance to meet these contentions. We believe that in a general rate case to which Alcoa was a party and in which the NFA and the 1971 Apportionment Agreement were integral parts of the case Alcoa should have been forewarned that the intervenors intended to show the agreements were beneficial to Alcoa at the expense of Nantahala's customers. We hold the

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procedure by which the Commission required Alcoa to prefile its testimony and its brief did not violate its due process rights.

Alcoa next contends it was deprived of due process by the Commission's consideration of evidence introduced at the hearings before it was made a party. There was sufficient evidence introduced at the hearings to which Alcoa was a party to support the Commission's findings of fact. We assume the Commission relied on this evidence.

[14] Alcoa next contends that the Utilities Commission improperly shifted the burden of proof. In its order the Utilities Commission made the following statement:

These findings by the Supreme Court, that Nantahala and Tapoco constitute a single, integrated electric system and should be treated as one system for rate-making purpose [sic], have been carefully considered by the Commission for purposes of this proceeding. However, since Alcoa and Tapoco were not parties to the original proceeding that led to the June 14, 1977 Order, the Commission has allowed them and Nantahala to introduce evidence in the remand proceeding to challenge the findings of the Supreme Court.

Alcoa argues that by treating statements in the Supreme Court's opinion as findings of fact and requiring it to challenge them, the Commission placed a burden of proof on Alcoa which constitutes error. We do not believe we can hold the Utilities Commission placed the burden of proof on Alcoa. It did not say that it did so and there is sufficient evidence for the Commission to find the facts as it did without the use of any presumption against Alcoa. It is unfortunate that the Utilities Commission used the language it did since the Supreme Court did not and could not find facts. Nevertheless, we do not believe this language requires us to reverse the Utilities Commission.

[15] Alcoa's last argument is that the Commission violated its own rules by conducting the hearing as a general rate case and not as a complaint proceeding against Alcoa without the procedural rules of a complaint proceeding which could have given a different result. We believe the Utilities Commission was correct in conducting the proceeding as a general rate case. The primary question was what is a fair rate of return on Nantahala's invest-

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ment so as to enable it by sound management to pay a fair profit to its stockholders and to maintain and expand its facilities and services in accordance with the reasonable requirement of its creditors. This would make it a general rate case. *See Utilities Comm. v. Gas Co.*, 259 N.C. 558, 131 S.E. 2d 303 (1963). The responsibility of Alcoa for Nantahala's refund was ancillary to the case.

[16] Nantahala assigns error to the Commission's requirement that it "refund to its North Carolina retail customers all revenue collected under the rates approved by Commission order issued June 14, 1977, to the extent that said rates produce revenue in excess of the rates approved herein." It argues that neither G.S. 62-132 nor G.S. 62-135 authorizes the Utilities Commission to order this refund. The opinion of our Supreme Court contains the following language:

"We believe that essential fairness to all the parties is best served by allowing the increased rates to remain in effect, conditional upon Nantahala's guarantee that it will in the future refund to its customers any overcharges should the new rates ultimately be deemed excessive. Accordingly, we . . . direct the Commission to obtain adequate assurances of Nantahala's willingness and continued ability to refund such overcharges as may ultimately result from imposition of the 1977 rate schedule." *Utilities Comm. v. Edmisten, Attorney General*, at 444, 263 S.E. 2d at 592.

We believe the Utilities Commission was following the mandate of the Supreme Court in this portion of the order. We would have to overrule the Supreme Court to sustain this assignment of error, which we cannot do.

[17] Finally, Nantahala argues that the order of the Commission confiscates the property of Nantahala and thus violates its due process rights. It contends that its refund obligation is more than its net worth and although Alcoa was ordered to pay so much of the refund obligation as Nantahala cannot pay and remain solvent. Alcoa denies its obligation to pay. Nantahala says it may be years before Alcoa has exhausted its remedies in federal court and in the meantime Nantahala will not be able to serve its customers if it is responsible for the refund. It argues that such an order cannot be in the best interests of its customers.

State ex rel. Utilities Comm. v. Nantahala Power & Light Co.

We have affirmed the order as being within the mandate of our Supreme Court's opinion. We do not believe Nantahala's due process rights have been violated. The Utilities Commission has ordered that Alcoa be responsible for a part of the refund. We do not believe we should hold that Alcoa will not pay it and Nantahala will have to pay the entire refund, leaving it bankrupt.

We believe the Utilities Commission has conducted hearings and entered an order within the mandate of the Supreme Court's opinion. The appellants make persuasive arguments, particularly as to the equities involved. Indeed a good argument could be made that the best friend Nantahala's customers have is Alcoa. It financed the building of large hydroelectric facilities at a time when Nantahala could not have justified constructing them for its public customers. Nantahala's customers have had for many years the benefit of these facilities built at 1941 costs. Nevertheless, these are not factors which the law allows to be taken into account in setting utility rates.

Affirmed.

Judges ARNOLD and BRASWELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 NOVEMBER 1983

BLEGGI v. BLEGGI No. 834DC607	Onslow (82CVD517)	Affirmed
DICKSON v. BOLYARD No. 8218DC1276	Guilford (82CVD1656)	Affirmed
IN THE MATTER OF CARTER No. 8321DC206	Forsyth (82SP632)	Affirmed
KAPP v. KAPP No. 8321DC393	Forsyth (81CVD1955)	Dismissed
KIRKS v. KIRKS No. 8310DC614	Wake (78CVD1458)	Affirmed
LAWSON v. ROGERS No. 8217SC1302	Rockingham (81CVS1206)	Affirmed
MEARES v. BD. OF S.S. OF BRUNSWICK CO. No. 8213SC1246	Brunswick (81CVS654)	Dismissed
RINKER v. FIRST UNION No. 8225SC1300	Caldwell (81CVS1297)	Dismissed
STATE v. ALEXANDER No. 832SC168	Beaufort (82CRS1707)	No Error
STATE v. BELL No. 8312SC560	Cumberland (82CRS26605)	No Error
STATE v. CARNES No. 8327SC604	Gaston (82CRS12105) (82CRS12117) (82CRS12118) (82CRS12119) (82CRS12120)	No Error
STATE v. CRUMP No. 824SC1227	Sampson (82CRS1099)	No Error
STATE v. DUNCAN No. 8329SC568	McDowell (82CRS4303)	No Error
STATE v. FORDHAM No. 838SC582	Lenoir (82CR9823)	No Error
STATE v. GREENE No. 8217SC359	Surry (81CRS4253)	No Error
STATE v. HOWARD, McKIEVER & PRYOR No. 8314DC149	Durham (82J103) (82J104) (82J105)	Dismissed

STATE v. KINLAW No. 8216SC1143	Robeson (81CRS22119)	No Error
STATE v. MATHEWS No. 8312SC554	Cumberland (82CRS44434)	No Error
STATE v. PACE No. 835SC541	New Hanover (82CRS7945)	No Error
STATE v. RUSSELL No. 8320SC650	Stanly (82CRS5022)	No Error
STATE v. SMITH No. 8325SC572	Catawba (82CRS12596) (82CRS12597)	Remand for Resentencing
STATE v. TENNANT No. 8328SC589	Buncombe (82CRS25171) (82CRS25172)	No Error
STATE v. WILKES No. 8319SC605	Cabarrus (80CRS7038)	Affirmed
STOCKTON v. HANKINS No. 8330SC567	Macon (82CVS35)	Dismissed
TRAVIS v. NUNN No. 8326DC611	Mecklenburg (78CVD2271)	Affirmed

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STATE OF NORTH CAROLINA v. TYRONE ISOM

No. 8319SC82

(Filed 6 December 1983)

1. Indictment and Warrant § 11— identification of victim in indictment sufficient

An indictment which named the victim as "Eldred Allison" was sufficient even though the victim said his name was "Elton Allison" since his wallet identification indicated his name was "Elred," the defendant referred to the victim as "Elred" and the names "Eldred," "Elred," and "Elton" are sufficiently similar to fall within the doctrine of *indemn sonans*.

2. Criminal Law § 73.2— officer's description of suspect—not hearsay

A question which asked an officer to tell the description of a suspect which he gave to another officer was not hearsay in that it called for facts within the personal knowledge of the officer and concerned a transaction in which he was personally engaged. The answer was also admissible to corroborate an earlier eyewitness's description of the suspect which had been received without objection. G.S. 15A-1443(a).

3. Criminal Law § 33— eyewitness's testimony concerning back door—relevant and properly admitted

An eyewitness who heard and saw defendant inside the victim's house, called the police, and talked to the officers at the scene, was properly allowed to respond that he told the police "where the back door was" in response to a question by the police since the witness had earlier testified that he observed the back door and noticed it was "just hanging there," since an officer described the rear door and said it looked as if it had been forced open, and since the victim had stated that he had checked his back door before lying down for the evening and that it was closed. The State merely presented to the jury evidence from which it could find factually a means for proof of the elements of breaking and entering within the charge of burglary.

4. Criminal Law § 138— conviction of first degree burglary and robbery with a dangerous weapon—two forty-year consecutive sentences not unduly harsh

In a prosecution for first degree burglary and robbery with a dangerous weapon, the imposition of consecutive forty-year sentences was not unduly harsh and was supported by the evidence. G.S. 14-52, G.S. 14-1.1, and G.S. 14-87(a).

5. Criminal Law § 138— aggravating circumstance that bodily injury inflicted in excess of minimum amount necessary to prove offense—properly considered

In a prosecution for first-degree burglary and robbery with a firearm, the trial court could properly consider as an aggravating factor that the defendant inflicted bodily injury upon his blind victim who was both helpless and defenseless in excess of the minimum amount necessary to prove this offense.

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6. Criminal Law § 138— aggravating factor that defendant served a prior prison term repetitive of previous finding that defendant had prior convictions punishable by more than sixty days' confinement

The trial court erred in finding as an aggravating factor that defendant had served a prior prison term while also finding that defendant had prior convictions for criminal offenses punishable by more than sixty days' confinement since (1) because the legislature specifically authorized the use of prior convictions as an aggravating factor, it is an indication that the sentence, whether suspended or served actively, is assumed within that legislative factor, and (2) the record was devoid of any other ground to consider "served a prior sentence" as being an appropriate finding in aggravation.

7. Criminal Law § 138— aggravating factor that "the offense was planned"—improperly considered

In a prosecution for first-degree burglary, the trial court erred in considering as an aggravating factor that "the offense was planned," although proof of planning is not an essential element in burglary cases, since the evidence in the record failed to support it.

8. Criminal Law § 138— aggravating factors that the sentence would deter others and that a lesser sentence would unduly depreciate the seriousness of the crime improperly considered

In a prosecution for first-degree burglary and robbery with a dangerous weapon, the trial court erred in considering as aggravating factors that the sentence was necessary to deter others from the commission of the same offense, and that a lesser sentence would unduly depreciate the seriousness of the defendant's crime.

Judge BECTON concurring in the result.

APPEAL by defendant from *Albright, Judge*. Judgment entered 8 September 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 September 1983.

Attorney General Edmisten by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Nancy C. Northcott for defendant appellant.

BRASWELL, Judge.

Elton Allison, about sixty-eight years old, blind and somewhat hard of hearing, was asleep on his couch in his home at 3:00 a.m. on the night of 7 July 1982. A blow from a stick across his head awakened Mr. Allison, and a man's voice said, "I'm going to kill you." During an altercation with the man, Mr. Allison's jaw and shoulder were hit, and his mouth bled. The glass window

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over the couch was broken. Dresser drawers were ransacked. A wallet with \$20 was taken by the intruder. A neighbor who had been watching television heard yells from Mr. Allison, went and investigated, saw the defendant whom he knew inside the house, and called the police. Tyrone Isom, the defendant, was convicted of first-degree burglary and robbery with a dangerous weapon of Mr. Allison. From the imposition of two, forty-year consecutive sentences of imprisonment, the defendant appeals.

The evidence reveals that the object with which Mr. Allison had been assaulted was a sawed-off pool cue which Allison used for a walking stick. The pool cue was broken in the altercation. The wallet and money were recovered from the person of the defendant upon his arrest a short while later on the same night.

Mr. Isom testified that as he was walking home that night he passed Mr. Allison's house; that Mr. Allison was in the door and called to him; that Mr. Allison was angry because someone had told Allison that Isom had broken into Allison's house before and had taken all his liquor and beer; that Allison hit him on the arm; and that he took the stick from Allison, hit him in the jaw, hit him three or four times, broke the stick, and walked out. The defendant during cross-examination by the State acknowledged that the fight occurred because "a blind man called you across the street while you were just simply quietly walking down the road and started assaulting you."

At the sentencing hearing, Mr. Isom testified again. For a first time he said that between 8:00 p.m. and 2:30 a.m. on the night in question he "had a pint and a half of vodka, two marijuana cigarettes, nine beers and three or four hits of speed"; that he knew everything he was doing because he "can handle it" and doesn't "let it get him crazy"; and that "I drink it in a sensible way, you know."

In his brief the defendant argues error: (1) by a variance between the name of the victim in the bills of indictment and the evidence; (2) by the reception of hearsay evidence about the back door of the house; and (3) by the sentences being unduly harsh and not supported by the evidence. Upon a careful review of the specific questions as raised, we find no merit and reject these assignments of error. To the assignment of error that the sentences imposed were based upon improper findings of ag-

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gravating factors, we reverse as to some factors as specifically mentioned below, and award a new sentencing hearing.

[1] On the issue of variance between the indictment and the evidence, we find that the defendant did not raise the question in the trial division. For a first time he would have this court find that the indictments "are fatally defective in that they identify the victim incorrectly." We disagree. Each indictment names the victim as "Eldred Allison." At trial, the victim said his name was "Elton Allison." However, his wallet identification indicated his name was "Elred." At trial, the defendant referred to the victim as "Elred Allison." We hold that the names "Eldred," "Elred," and "Elton" are sufficiently similar to fall within the doctrine of *indemn sonans*. The variance is wholly immaterial. See *State v. Williams*, 269 N.C. 376, 152 S.E. 2d 478 (1967), "Mateleane" for "Madeleine." See also, *State v. Higgs*, 270 N.C. 111, 153 S.E. 2d 781 (1967), "Beauford Merrill" for "Burford Murril"; *State v. Vincent*, 222 N.C. 543, 23 S.E. 2d 832 (1943), "Vincent" for "Vinson"; and *State v. Gibson*, 221 N.C. 252, 20 S.E. 2d 51 (1942), "Robinson" for "Rolison."

[2] As to the alleged use of hearsay testimony, this challenge comes from what one police officer said to another. During the testimony of police officer R. E. Cauthen, he related that Officer H. W. Black also came to the scene. They talked. Cauthen was then asked, "Now, what description did you give to Officer Black here?" With the objection being overruled, the witness answered, "Advised that we were looking for a black male with light colored pants on and a darker shirt." No motion to strike was made. Thereafter, the witness was asked, and answered without any objection, as to what description Jeffrey Roberson had given him of the clothing Mr. Isom was wearing. We also note that when Mr. Isom testified he readily admitted that he had been inside Allison's house. We hold that the first question to Officer Cauthen was not hearsay. The answer called for facts within the personal knowledge of Cauthen and concerned a transaction in which he personally engaged. Here, Officer Cauthen was the declarant. The answer was also admissible to corroborate Roberson's description which was received without objection. Evidence of similar import was received from others. There has been no showing of a reasonable possibility that had the alleged error in question not been committed, a different result would have been reached at trial.

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G.S. 15A-1443(a). There was no prejudice in the admission of the challenged proper and relevant evidence.

The defendant also argues that the relevance of some of the State's evidence was outweighed by its prejudicial effect. Under this assignment he protests his cross-examination by the State as to his awareness of the blindness and hearing problem of the victim. Also, he contends that the cross-examination concerning his prior criminal record was improper. We have carefully examined each of these assignments, find nothing new or novel involved, and hold that the appellant has failed to show any error in the admission of any of this evidence.

[3] Of similar vein is the defendant's contention that evidence was received from State's witness Jeffrey Roberson that was not within his personal knowledge. Roberson, from all the evidence, heard and saw defendant inside Allison's house, called the police, and talked to the officers at the scene. Roberson said, "As the police was talking to me, they was questioning me about the door. Did I know which—how he might have got in and I told them where the back door was." The defendant's objection to this statement was overruled. Thereafter, Roberson testified without objection that he observed the back door, that the piece around the latch was broken out and the bottom hinge was broken off, and that it was "just hanging there." Later, Officer Cauthen, without objection, described the rear door and said that "[a]round the latching device was broken off like it had been forced open. The wood [on the facing of the door] was broken and also one of the hinges was broken on the door." Previously, the victim had stated that he had checked his back door before lying down for the evening and that it was closed. Under these circumstances Roberson's telling the officers "where the back door was" was not error, or if error, was not prejudicial. The State merely presented to the jury evidence from which it could find factually a means for proof of the elements of breaking and entering within the charge of burglary. In context, the answer of Roberson was relevant and does not constitute prejudicial error.

[4] The next issue asks whether the imposition of consecutive forty-year sentences was unduly harsh and unsupported by the evidence. From a thorough reading of the record, we answer no. The terms of imprisonment were within the range permitted by

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law. First-degree burglary, a Class C felony, carries a maximum penalty of life imprisonment or a term of fifty years. G.S. 14-52; G.S. 14-1.1. Having found that the aggravating factors exceed the mitigating factors [there were no mitigating factors], the trial judge was within his discretion to enhance the term of imprisonment to 40 years. *State v. Melton*, 307 N.C. 370, 380, 298 S.E. 2d 673, 680 (1983). On the offense of robbery with a dangerous weapon, a Class D felony, the maximum term of imprisonment is forty years. G.S. 14-87(a); G.S. 14-1.1. As explained in the Institute of Government publication by S. Clarke & E. Rubinsky, *North Carolina's Fair Sentencing Act: Explanation, Text, and Felony Classification Table*, at 7 (rev. 1981), "[t]he act continues existing law by giving the sentencing judge full discretion to: . . . (2) impose . . . consecutive terms for multiple offenses." Thus, a statutory permissible sentence of less than life imprisonment of forty years plus forty years is not an abuse of discretion. The defendant's further challenge by brief that the evidence does not support the sentence amounts to a broadside exception. This sweeping exception to the entry of judgment raises only the question of whether there is error or fatal defect upon the face of the record proper. *State v. Talbert*, 285 N.C. 221, 203 S.E. 2d 835 (1974). Upon a review of the record we find no error or fatal defect upon its face.

We turn now to the question of the validity of the findings of aggravating factors in sentencing. Pursuant to *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983), the judge listed separately for each offense the aggravating factors which he found, and then stated "[t]hat no factors in mitigation were proven by the preponderance of the evidence and there is no believable evidence to support any mitigating factors." For each offense the judge found as aggravating factors that:

1. The victim was elderly and blind.
2. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.
3. The defendant inflicted bodily injury upon his blind victim who was both helpless and defenseless in excess of the minimum amount necessary to prove this offense.

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4. The defendant has served a prior prison term.
5. The sentence pronounced by the court is necessary to deter others from the commission of the same offense.
6. A lesser sentence than that pronounced by the court will unduly depreciate the seriousness of the defendant's crime.
7. The defendant's history makes it necessary to segregate him from the public, for its safety, for an extended term.

As one additional aggravating factor in the first-degree burglary case, the court found that "the offense was planned."

[5] It is noteworthy that the defendant took exceptions only to those factors which we list as numbers 3 and 4 above, and to the additional finding that the offense was planned. Concerning factor number 3, we hold that the infliction of bodily injury in any amount is not an element of either first-degree burglary or robbery with a firearm. The bodily injury inflicted consisted of wounds from blows with a pool cue stick to the head, jaw, and shoulder which caused the victim's mouth as well as two spots on top of his head to bleed. Officer Cauthen saw three knots on Allison's head with a small amount of blood coming from each one, saw bleeding from the mouth, and heard Allison complain of pain in his shoulder. This unprovoked assault and battery upon Mr. Allison is indicative of an offender, as described in *State v. Ahearn, id.* at 607, 300 S.E. 2d at 703, "[w]ho strikes out indiscriminately because of his own inadequacies and who cannot exercise his human faculties of reason and judgment" so as to be "as dangerous to society as the offender who targets his victim for a calculated motive." We hold the defendant's contentions that the finding of excessive bodily injury to have been used by the State to supply proof of the existence of the element of "intent" to commit felony of robbery in the burglary charge, and of proof of the element of "threat or endangerment" in the armed robbery charge to be without merit and are rejected.

[6] The defendant contends that factor number 4 above, that the defendant has served a prior prison term, is "merely repetitive" of the previous finding that the defendant had prior convictions for criminal offenses punishable by more than 60 days' confine-

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ment, and "merely reinforces" it. He argues that the fact that a defendant did not actually serve the sentence imposed is merely a part of the consideration of his past record. Because the legislature specifically authorized the use of prior convictions as an aggravating factor, it is an indication to us that the sentence, whether suspended or served actively, is subsumed within that legislated factor. If there be some other ground to consider "served a prior sentence" as being an appropriate finding in aggravation, we note that there is no recitation of facts in the record before us to support this finding. The point may have been "discussed" at the trial court level, but it did not get reported on the printed page. We uphold this assignment of error.

[7] The final exception to the aggravating factors in the burglary case is that "the offense was planned." Upon our reading of *State v. Chatman*, 308 N.C. 169, 179, 301 S.E. 2d 71, 77 (1983), also a first-degree burglary case, we note that the same trial court there found as an aggravating factor that "the offense was planned." The challenge in *Chatman* was that the evidence was insufficient to support the finding of planning. In rejecting the defendant's argument as "specious," *id.* at 180, 301 S.E. 2d at 77, the *Chatman* court found plenary record evidence showing that "the defendant would drive around in his car at night and break into homes for the purpose of raping women." Here, the record discloses no evidence of any nature of any prior plan to burglarize. The evidence shows the facts of this one event only. The basis of the assignment of error also differs from *Chatman*. The defendant Isom alleges that the sentence was based on the improper aggravating factor "the offense was planned" because this is an "essential element" of burglary, and that the essential elements of an offense may not be used separately as an aggravating factor. Isom contends that the only planning involved is that which is implicit in the intention to commit the felony of robbery inside the house, and thus the evidence became a part of the element of planning. We disagree with defendant's argument and hold that proof that the offense was planned is not an essential element of burglary in the first degree. By analogy, just as proof of motive is not an essential element of murder in the first degree, even though evidence of motive may be presented, proof of planning is not essential in burglary cases although evidence, direct or circumstantial, may be introduced to show the existence

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of planning. However, it was prejudicial error to find the aggravating factor of planning in this case because of lack of evidence in the record to support it.

[8] It is factors 5 and 6 above which cause us the most concern. Those aggravating factors—to deter others and a lesser sentence would unduly depreciate the seriousness of the crime—were both factors found as aggravation in *Chatman*. In remanding for a re-sentencing on the burglary count, the *Chatman* court said:

These two factors fall within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to *the character or conduct of the offender*. (Emphasis in original.)

Chatman, *id.* at 180, 301 S.E. 2d at 78. *Chatman* also reiterated the holding in *State v. Ahearn* that “in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.”¹ *Id.* at 180-81, 301 S.E. 2d at 78, quoting *State v. Ahearn*, *supra*, at 602, 300 S.E. 2d at 701. We recognize that this case was tried at a September 1982 term of Superior Court and that the *Chatman* decision was not filed until 5 April 1983. However, we feel, in view of the express holdings in *Chatman* and *Ahearn* that there are “circumstances which manifest inherent unfairness and injustice,” *Ahearn*, *supra*, at 598, 300 S.E. 2d at 697-98, quoting *State v.*

1. Query, whether the North Carolina Supreme Court has gone further than the United States Supreme Court in requiring a new trial whenever there is any error in the findings of aggravating factors. We merely point out this state of affairs. When there were no mitigating factors and the sole error was in one of multiple aggravating factors the United States Supreme Court upheld death sentences in *Zant v. Stephens*, --- U.S. ---, 77 L.Ed. 2d 235, 103 S.Ct. 2733 (1983) [“Death sentence held not constitutionally impaired by invalidity of one of several statutory aggravating circumstances found by jury.” 77 L.Ed. 2d at 235, editor’s summary], and *Barclay v. Florida*, --- U.S. ---, 77 L.Ed. 2d 1134, 103 S.Ct. 3418 (1983) [“Florida’s death sentence held valid despite trial court’s consideration of accused prior record in violation of state law.” 77 L.Ed. 2d at 1134, editor’s summary]. In the case before us as well as *Zant* and *Barclay*, there were no mitigating factors. *Chatman* was decided 5 April 1983, *Zant* on 22 June 1983, and *Barclay* on 6 July 1983.

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Pope, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962), and which require us also to order a new sentencing hearing because of factors 5 and 6.

The results are: No error in the conviction of first-degree burglary and in the conviction of robbery with a dangerous weapon. Each case is remanded to the Superior Court of Cabarrus County for resentencing at a new sentencing hearing.

Judge JOHNSON concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

State v. Chatman, 308 N.C. 169, 301 S.E. 2d 71 (1983) and *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983) require a new sentencing hearing in this case since the trial court found as aggravating factors that "[t]he sentence pronounced by the court is necessary to deter others from the commission of the same offense" and that "[a] lesser sentence than that pronounced by the court will unduly depreciate the seriousness of the defendant's crime." I, therefore, concur in the majority's decision remanding this matter for resentencing. I write this concurring opinion, however, because I believe another error was committed at defendant's sentencing hearing and because I disagree with what may be an implicit, albeit unintended, suggestion in footnote 1 of this Court's opinion that *Ahearn* needs to be reconsidered in view of recent United States Supreme Court holdings.

I

I find merit in defendant's argument that the trial court erroneously used an essential element of the offense—that defendant intended to commit the felony of robbery in the house—to find, as an aggravating factor, that the burglary was "planned." Some "planning" is involved in every burglary. One who, on the spur of the moment, determines to burglarize a man's house to steal money nevertheless has planned his action. Hasty, ill-advised, and less-than-detailed planning does not absolve a burglar of guilt. Further, there was no evidence in this case that defendant attempted to commit other burglaries. The absence of

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evidence evincing a design, or scheme, to commit a *series* of burglaries distinguishes this case from *State v. Chatman*. In *Chatman*, our Supreme Court upheld a finding that the burglary was planned solely because of evidence suggesting a master plan. The *Chatman* Court specifically found that "[t]here was evidence that the defendant would drive around in his car at night and break into homes for the purpose of raping women."

II

Because footnote 1, ante p. 231, may suggest to some that the North Carolina Supreme Court, in requiring a new sentencing hearing whenever there is error in the finding of aggravating factors (*Ahearn*) went further than the United States Supreme Court, I believe the following comments are appropriate. First, a state is free to give its citizens more protection than that minimally required by the United States Constitution as interpreted by the United States Supreme Court. Second, with limited exceptions, it is the responsibility of the North Carolina Supreme Court, not the United States Supreme Court, to interpret North Carolina statutes. Third, to compare fair sentencing acts and death penalty statutes, as done in footnote 1, is to compare apples and oranges. The comparison is made more difficult by the fact, for example, that the Georgia death penalty statute requires a finding of aggravating circumstances by the jury, not by a judge. By way of further example, under Florida's death penalty statute, the greater punishment (death) will not be imposed based entirely upon non-statutory aggravating circumstances. More specifically, it was only after the Supreme Court of Georgia, in response to a question certified to it by the United States Supreme Court, explained why the failure of one aggravating circumstance did not invalidate the prisoner's death sentence, that the United States Supreme Court upheld the death sentence in *Zant v. Stephens*, --- U.S. ---, 77 L.Ed. 2d 235, 103 S.Ct. --- (1983). Similarly, the United States Supreme Court, in *Barclay v. Florida*, --- U.S. ---, 77 L.Ed. 2d 1134, 103 S.Ct. --- (1983), upheld Barclay's death sentence only after it reviewed Florida Supreme Court decisions and determined that the erroneous consideration of defendant's criminal record as an aggravating circumstance was harmless error under Florida law. *Zant* and *Barclay* both turned on the interpretation of state law by state courts.

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STATE OF NORTH CAROLINA v. MELVIN BELL

No. 835SC195

(Filed 6 December 1983)

Homicide § 21.7— second degree murder—insufficiency of evidence

The evidence was insufficient to support conviction of defendant for second degree murder where it tended to show that at 4:45 p.m. on 12 June a man wearing a flowered shirt was seen crawling from the window of a home; police found a bloodstained rubber glove on the porch of the home; an analysis of bloodstains on the glove indicated they were consistent with the victim's blood; about 25 minutes later, an officer was dispatched to another address to investigate a possible break-in; the officer saw defendant, wearing a flowered shirt, jump from a fence and begin walking away; defendant was arrested and a 10-inch knife was found about five feet from the spot where defendant jumped from the fence; the owner of the premises indicated that the knife was not hers; keys which fit the victim's apartment and post office box were found in defendant's pocket; the victim's body was discovered in his apartment at 1:00 p.m. on 13 June; there was a pool of blood around the victim's head; police found in the apartment a sheath which fit the knife found near where defendant was arrested; blood on a pipe and handkerchief found in the apartment was consistent with the victim's blood type, and blood on a hatchet, pillowcase and sheet found therein was consistent with defendant's blood type; and the victim died from a blow to the head with a wine bottle.

Chief Judge VAUGHN dissenting.

APPEAL by defendant from *Tillery, Judge*. Judgment entered 4 December 1981 in NEW HANOVER County Superior Court. Heard in the Court of Appeals 24 October 1983.

Defendant Melvin Bell was charged with the second-degree murder of Willie Hamilton, whose body was found in his Wilmington apartment at 1:00 p.m. on 13 June 1981.

Evidence for the state tended to show the following facts and events. At about 4:45 p.m. on 12 June 1981, Alice Newton saw a man trying to crawl from a window of a home at 514 Princess Street, where Ms. Newton worked as a nurse's aide. Ms. Newton called police, who found a bloodstained blue rubber glove on the porch of the home, but discovered no intruder. An analysis of the bloodstains on the glove indicated they were consistent with Hamilton's blood. Ms. Newton told police the intruder was a balding man wearing a flowered shirt.

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About twenty-five minutes later, at 5:09 p.m., Officer Fredlaw of the Wilmington Police Department was dispatched to 614 Ninth Street to investigate a possible break-in at that address. When Officer Fredlaw arrived he went to the backyard, where he saw defendant, wearing a flowered shirt, jump from a fence, and begin walking away. Defendant was arrested and a short time later a ten-inch dagger was found about five feet from the spot where defendant jumped off the fence. The owner of the premises indicated the knife was not hers and that she had never seen it before.

A search of defendant was conducted at the Wilmington Police Station and revealed bloodstains on defendant's clothing and keys in defendant's pockets which fit Hamilton's apartment and post office box. The bloodstains proved consistent with defendant's blood and inconsistent with Hamilton's blood type.

At 1:00 p.m. on 13 June 1981, Wilmington police entered Hamilton's apartment at 114 North Sixth Street, and found him dead on the floor. There was a pool of blood around Hamilton's head, the body was partially disrobed, and had been castrated. A number of items seized at the apartment were placed into evidence, including a sheath which fit the knife found near where defendant was arrested, and a bloody hatchet, pipe, pillowcase, sheet and handkerchief. The blood on the pipe and handkerchief were consistent with Hamilton's blood type, and the bloodstains on the hatchet, pillowcase and sheet were consistent with defendant's blood type. The time Hamilton died was unclear, but could have occurred as early as 3:30 p.m. on 12 June 1981, or as late as 1:00 p.m. on 13 June 1981. Hamilton probably died of a blow to the head with a wine bottle whose shattered fragments were found in Hamilton's scalp and near his body.

Evidence for defendant tended to show that Ms. Newton was unable to identify defendant as the man she saw emerge from the window at 514 Princess Street, and furthermore that it would be difficult for a man to travel from 514 Princess Street to 614 Ninth Street, in the time between the two break-ins. A neighbor testified that she heard sounds from Hamilton's apartment as late as 5:30 p.m. on 12 June 1981, and that Hamilton may thus have been alive at the time defendant was arrested. The wounds to the victim's head were relatively superficial and would not ordinarily

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have been serious enough to cause death and it was possible that the victim, who was a seventy year old alcoholic, may have died from alcohol poisoning. No fingerprints were found at the scene of the crime other than the victim's own, and there were no visible cuts or scratches on defendant at the time of his arrest.

Defendant was convicted of second-degree murder following a jury trial, and sentenced to twenty-five years in prison. From entry of judgment upon the verdict, defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General James C. Gulick and Special Deputy Attorney General John R. B. Matthis, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant.

WELLS, Judge.

In his first assignment of error, defendant contends that the trial court erred in failing to grant his motion to dismiss the murder charge. We agree.

"Upon the defendant's motion for judgment of nonsuit in a criminal action, the question for the court is whether there is substantial evidence of each essential element of the offense charged, or of a lesser offense included therein, and of the defendant's being the perpetrator of such offense. . . . In making this determination, the evidence must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference to be drawn from it. . . .

"The test of the sufficiency of the evidence to withstand the motion for judgment of nonsuit is the same whether the evidence is circumstantial, direct or both. . . . There is substantial evidence of each element of the offense charged, . . . and of the identity of the defendant as the perpetrator of it if, but only if, interpreting the evidence in accordance with the foregoing rule, the jury could draw a reasonable inference of each such fact from the evidence. . . . If, on the other hand, the evidence so considered, together with all reasonable inferences to be drawn therefrom, raises no more than a suspicion or a conjecture, either that the offense charged in the indictment, or a lesser offense included

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therein, has been committed or that the defendant committed it, the evidence is not sufficient and the motion for judgment of non-suit should be allowed." [Citations omitted.] *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied*, 414 U.S. 874, 94 S.Ct. 157, 38 L.Ed. 2d 114 (1973); *see also State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

The rule, thus stated, proves more difficult in application than in formulation. Nearly a century ago, our courts recognized that the question ". . . whether there is sufficient evidence to go to the jury . . . is often [an] embarrassing one to the courts and probably gives them as much trouble as any question that comes before them" *State v. Gragg*, 122 N.C. 1082, 30 S.E. 306 (1898). Twentieth century courts have made little progress toward resolving the problem and cases decided since *Gragg* lack consistent analyses and results. The difficulty of applying the standard consistently to the varying facts of each case increases where evidence of the defendant's guilt is purely circumstantial. This is so because determining the significance of circumstantial evidence requires the trier of fact to infer the presence of a disputed fact from an offered fact, a logical step not required in evaluating direct evidence.

Perhaps it is this additional step which explains the confusion in decisions concerning sufficiency of the evidence. The lack of consistency in the case law begs for the construction of some test or guideline around which both defense and prosecution attorneys could build their cases. Our analysis of the cases and the problem before us, however, convinces us that such a standard, while desirable, would not be sufficiently flexible and is certainly not supported by precedent.

The first area of confusion in decided cases concerns the quantum of proof that the state must present in order to survive a defendant's motion to dismiss. Earlier cases required that the state must present evidence inconsistent with any hypothesis other than guilt. *State v. Harvey*, 228 N.C. 62, 44 S.E. 2d 472 (1947). This language was overruled, at least formally, in *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). In that case the court held that the state need only present substantial evidence of all material elements of the offense to overcome a motion to

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dismiss. "To hold that the court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of facts." *Id.* While the rule appears sound and well-reasoned, it is unclear whether introduction of the new standard has made a significant difference in the outcome of cases. *See, e.g., State v. Lee*, 294 N.C. 299, 240 S.E. 2d 449 (1978), in which the court noted that the facts presented by the state "excited suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party . . ." *citing State v. Goodson*, 107 N.C. 798, 12 S.E. 329 (1890).

In addition to the inconsistent language concerning the level of proof required of each material element of the crime, the cases fail to specify how much evidence the state must produce that the defendant is the perpetrator of the crime. The modern "test" states only that there must be substantial proof of each element of the crime and that the defendant committed the act. There appears to be no logical reason to require less than "substantial" proof that defendant is the perpetrator, however, despite the lack of authority on the subject.

The difficulty in labelling the required level of proof that defendant committed the crime touches only the surface of the problem presented upon a motion to dismiss. The real problem lies in applying the test to the individual facts of a case, particularly where the proof is circumstantial. One method courts use to assist analysis is to classify evidence of guilt into several rather broad categories. Although the language is by no means consistent, courts often speak in terms of proof of motive, opportunity, capability and identity, all of which are merely different ways to show that a particular person committed a particular crime. In most cases these factors are not essential elements of the crime, but instead are circumstances which are relevant to identify an accused as the perpetrator of a crime. *See, e.g., State v. Palmer*, 230 N.C. 205, 52 S.E. 2d 908 (1950); *State v. O'Neal*, 187 N.C. 22, 120 S.E. 817 (1924); Brandis, North Carolina Evidence § 83 (2d rev. ed. 1982). While the cases do not generally indicate what weight is to be given evidence of these various factors, a few rough rules do appear. It is clear, for instance, that evidence of *either* motive or opportunity alone is insufficient to carry a

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case to the jury. *State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977) (the victim lived in a mobile home adjacent to the motel where defendant lived; defendant, a black man, frequently visited the victim; a black man was seen running away from the mobile home on the evening of the killing; there was blood on the carpet of defendant's motel room, and a knife similar to the murder weapon was found in defendant's room); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967) (defendant was seen driving to the victim's house twice on the day of the killing and that his truck was parked in the victim's yard; defendant, who had been drinking heavily, returned home on the day of the killing with a deep head wound; and a search of defendant's room revealed a bloody pocket knife with chest hairs similar to the victim's stuck on the blade); see also *State v. Hendrick*, 232 N.C. 447, 61 S.E. 2d 349 (1950); 4 N.C. Index 3d, *Criminal Law* § 106.2.

When the question is whether evidence of *both* motive and opportunity will be sufficient to survive a motion to dismiss, the answer is much less clear. The answer appears to rest more upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable "bright line" test. For instance, in *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924, 98 S.Ct. 402, 54 L.Ed. 2d 281 (1977), defendant threatened ex-wife repeatedly, tried to hire others to kill her, possessed a garage door opener to her home and lived within five minutes of her home. Our Supreme Court held that this evidence was sufficient only to raise a suspicion or conjecture as to defendant's guilt and that defendant's motion to dismiss should have been allowed. Likewise, the evidence was deemed insufficient in the following cases: *State v. Lee*, *supra* (defendant had beaten and threatened the victim, who was his former lover, was aware she had had an affair with a neighbor, owned a gun and lived in the same mobile home with her, a few miles from the spot where the victim was found shot to death); *State v. Gragg*, *supra* (defendant bore grudges against both victims, had threatened them, possessed dynamite of the kind used in the murder and was seen within half a mile of the victims' home on the day of the killing).

It seems impossible therefore, to glean from the existing cases any clear, bright-line test by which it can be accurately and consistently determined when the state has presented sufficient

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substantial circumstantial evidence of identity of the perpetrator to survive a defendant's motion to dismiss. Nor does the nature of the problem lend itself to construction of such a test. In many ways the problem of determining when "substantial" evidence of identity has been presented is similar to the problem of determining whether evidence is relevant and therefore admissible. To be relevant, evidence must tend however slightly, to prove existence of a disputed fact. To analogize, the state's evidence must tend substantially to prove the disputed fact that defendant is the perpetrator. The levels of proof required to establish relevancy and substantial evidence of identity are of course different, but in both cases inferences from an established fact must be drawn to establish a disputed fact, based on established rules of physics or common experience. *Brandis, supra*, § 81. *Brandis* has warned against attempting to erect bright-line tests for determining relevancy of evidence.

Indeed, the variety of possible fact situations is so nearly infinite that, as the Court has recognized, no precise rule of general application can be formulated. . . . in the absence of a clearly applicable and authoritative precedent, problems of relevancy can be resolved only by logic and experience, hopefully leavened with a modicum of common sense. Since the first of these three elements is subject to refined disputation and the other two vary rather widely as between judges, the combination does not guarantee unanimity or even consensus in specific situations. But no better approach is available or is likely to become available through ingeniously contrived, judicially enunciated "test" or definitions; nor is the omnipotent computer likely to be of aid.

Id. § 78, 290 n. 22.

Recognizing that existing case law and the necessity to retain flexibility are aligned against temptation to construct a bright-line test, we are left with the standard of reviewing motions to dismiss in cases such as the one now before us "in the light of all the circumstances," which at least has the blessings of precedent, although it lacks predictability. We turn, therefore, to an analysis of the state's evidence in the case before us, to determine if the state presented substantial evidence that defendant committed the crime. We conclude the state did not meet its bur-

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den and that the motion to dismiss should have been allowed. The only substantial evidence linking defendant to the crime consisted of the victim's keys which were found in defendant's pockets.

While the state argues otherwise, we conclude that the evidence of the results of tests of blood taken from the victim's apartment and from the rubber glove are of such small positive probative value that it did not serve to identify defendant as the perpetrator. It is well established that blood tests are "highly probative negatively" but have "minimal" positive probative value. That is, while the tests may accurately determine that a person could not have been the source of a certain blood type, the tests cannot accurately establish that a particular, single individual was the source of the blood. *State v. Fulton*, 299 N.C. 491, 263 S.E. 2d 608 (1980); Annot., 2 A.L.R. 4th 500 (1980 & 1983 Supp.). The evidence linking defendant to the Princess Street break-in and the glove found on the porch of the home there was so nebulous as to lack probative value. Ms. Newton was unable to identify defendant as the man she saw climb out of the Princess Street home; nor did she know how the glove was deposited on the porch. Further, there was no evidence that when arrested, defendant had any wounds from which he could have left blood at the scene of the crime.

The fact that the knife found near the spot where defendant was arrested fit the sheath found in the victim's apartment is of little probative value. First, the inference must be drawn that the knife belonged to defendant only because it was found near where defendant was apprehended. Second, the inference must be drawn that the knife found near defendant belonged to the sheath found in Hamilton's apartment. Such evidence is far too tenuous to be considered as substantial proof of anything.

Evidence that the victim's keys were found in defendant's pocket tends to show that defendant had access to the victim's apartment and therefore had the opportunity to murder him, but does not constitute substantial evidence of motive.

In sum, the evidence taken in the light most favorable to the state at the most shows only defendant had an opportunity to kill the victim. As discussed above, evidence of opportunity alone is insufficient to survive a defendant's motion to dismiss. A careful review of all the circumstances shown by the state's evidence in

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this case leads us to the conclusion that the state raised no more than a suspicion that defendant murdered Hamilton, and that, therefore, defendant's motion to dismiss should have been allowed.

Defendant has raised numerous other exceptions and assignments of error which we need not address in light of our holding that defendant's conviction may not stand. For the reasons stated, the judgment below must be and is

Reversed and vacated.

Judge JOHNSON concurs.

Chief Judge VAUGHN dissents.

Chief Judge VAUGHN dissenting.

The majority opinion is well written and persuasive. I must, however, respectfully dissent. I feel, as did the able and experienced judge who tried the case, that the State presented an array of circumstances pointing to defendant's guilt sufficient to take the case to the jury. The twelve found those circumstances so convincing that they had no reasonable doubt as to his guilt. I would not disturb the verdict.

CHEMICAL REALTY CORPORATION v. HOME FEDERAL SAVINGS AND
LOAN ASSOCIATION OF HOLLYWOOD

No. 8228SC1265

(Filed 6 December 1983)

Appeal and Error § 57—breach of contract action—failure to make sufficient findings of fact

In a civil action to recover damages for an alleged breach of contract, the trial court's findings failed to address crucial aspects of the rights and obligations of the parties arising upon the evidence and the case must be remanded for the trial court to make further findings which will enable the appellate court "to review the decision and test the correctness of the judgment." G.S. 1A-1, Rule 52(a)(1).

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APPEAL by plaintiff from *Allen, Judge*. Judgment entered 29 June 1982 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 24 October 1983.

Plaintiff sued defendant to recover damages for an alleged breach of contract. In its complaint, plaintiff claimed that defendant had agreed to a "takeout" or purchase of the plaintiff's construction loan to Landmark Hotel, Inc. (hereinafter, Landmark). Plaintiff alleged that it had made a construction loan to Landmark in reliance on defendant's promise to provide the long-term financing of the Landmark hotel. Defendant refused to make the long-term loan to Landmark after plaintiff had advanced funds under the construction loan.

Plaintiff alleged that defendant had a contractual duty to fund the long-term loan for two reasons. First, defendant had issued a permanent loan commitment to Landmark in which defendant promised, under certain terms, to provide long-term financing for Landmark's hotel. Plaintiff alleged that it was a third party beneficiary of defendant's permanent loan commitment to Landmark. Second, defendant sent a letter to plaintiff agreeing to purchase the construction loan note and accept an assignment of the deed of trust held by plaintiff as long as there had been no default of the terms of the permanent loan commitment. Plaintiff alleged that this letter created a direct contractual duty running from defendant to plaintiff. Plaintiff's amended complaint asked for \$5,694,951.56 in damages.

In its answer, defendant denied that plaintiff was a third party beneficiary of the permanent loan commitment and denied that its letter to plaintiff formed a contract. Defendant also alleged that it had no obligation under the permanent loan commitment since the terms of the commitment had not been fulfilled.

The stipulations and evidence at trial tended to show the following. Landmark's predecessor-in-interest had acquired some land in Asheville on which it planned to build a hotel. It entered into negotiations with defendant for a long-term mortgage loan to finance the hotel. On 14 April 1972 defendant issued a permanent loan commitment letter which Landmark's predecessor-in-interest executed and returned along with a \$60,000.00 commitment fee. The commitment letter was later modified to substitute Landmark as the borrower, and in other minor aspects.

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The commitment letter included the following pertinent terms. Defendant committed itself to loan \$6,000,000.00 for the proposed hotel, as described in a feasibility report, to be disbursed upon completion of the hotel. The loan was conditioned on receipt of an appraisal of not less than \$8,000,000.00 for the real estate to be encumbered. The loan was "subject to an acceptable management contract to be executed by the borrower and the Hyatt House Hotel Corp." It was also subject to defendant being placed in the position of a mortgagee holding a valid first lien, with title insurance to be provided by a company acceptable to defendant. Payment of the \$60,000.00 commitment fee by 15 May 1972 kept the commitment in effect for one year from the date of the 14 April 1972 commitment letter. Six-month extensions of the commitment could be obtained by payment of an additional \$30,000.00 fee for each extension; however, any extension fee had to be paid fifteen days prior to the expiration of the outstanding commitment. The commitment was to automatically terminate upon, among other things, the failure of defendant "to receive written certification from all applicable Government Authorities indicating that the completed project has been approved by them"

Landmark's proposed contract with Hyatt House Hotel Corp. was rejected by defendant because Hyatt wanted defendant to subordinate its interests as first mortgagee to Hyatt. Landmark then proposed Motor Inn Management, Inc. (hereinafter, MIM) and on 13 November 1972 defendant agreed to accept MIM as the management company instead of Hyatt.

Also in November, 1972, a broker approached plaintiff about becoming the construction lender for the Landmark project. Plaintiff reviewed the permanent loan commitment of defendant and issued a construction loan commitment to Landmark on the condition that Landmark, plaintiff, and defendant would enter into a tripartite buy-sell agreement whereby plaintiff's construction loan would be repaid from defendant's permanent loan. Not until after the construction loan commitment had been issued in December of 1972 did plaintiff enter into negotiations with defendant for this proposed takeout agreement. Defendant refused to enter the tripartite agreement proposed by plaintiff. Defendant felt that the proposed agreement would have forced it to take out the construction loan "come hell or high water." Plaintiff modified its

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construction loan commitment on 7 February 1973 to eliminate the requirement of a tripartite agreement.

Plaintiff and defendant continued to discuss the arrangements by which defendant would become Landmark's permanent lender. Plaintiff and an intermediary broker worked out terms that were acceptable to defendant. These terms were set forth in an undated letter executed by defendant and delivered to the intermediary in early April, 1973. The intermediary passed the undated letter on to plaintiff. The letter stated in part that,

This is to confirm that the Commitment and amendments, copies of which are attached hereto, is in full force and effect as of the date hereof, that there have been no modifications thereof and that no modifications shall be made without your consent and pursuant to such commitment. This is to confirm that:

1. We have received, in full satisfaction of the terms of paragraph numbered 1 of the Commitment, and MAI appraisal indicating a value in the Premises, upon completion of the improvements of at least \$8,000,000;

2. We have reviewed the Chicago Title Insurance Company commitment for Title Insurance No. 73-U-00006 attached hereto as marked up with deletions crossed through and additions noted thereon; Chicago Title Insurance Company is acceptable to us as the title insurer and policy to be issued to us pursuant to paragraph 5 of our commitment . . . will be satisfactory and acceptable by us.

. . .

4. We have found acceptable and approved the Management Contract dated December 26, 1972 between Asheville Development Associates and Motor Inn Management, Inc. as assigned to the Borrower satisfying the terms of paragraph numbered 4 of the Commitment;

5. We have received the \$60,000 commitment fee referred to in paragraph numbered 8 on the Commitment and agree that we will accept from you the additional \$90,000 commitment fee at the closing of the construction loan whereupon the Commitment will be automatically extended to October 14, 1974;

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6. The issuance of (a) the Certificate of Completion referred to in Section 307 of the Contract for Sale of Land For Private Redevelopment by and between Overland Investments, Ltd. and Housing Authority of The City of Asheville and (b) a Certificate of Occupancy, will satisfy the conditions of paragraph numbered 9 (a) of the Commitment;

. . .

10. We have approved, in all respects the First Mortgage Real Estate Note and Deed of Trust, copies of which are attached hereto, and agree that at the appropriate time, as provided in the Commitment, we will purchase said First Real Estate Note from you, without recourse, and accept the assignment of said Deed of Trust provided however that the loan is not in default under the terms of our Commitment or our loan documents. We have also approved the form of the assignment of the Deed of Trust to be made by you to us, a copy of which is attached hereto.

11. We have reviewed the Construction Note and Construction Deed of Trust attached hereto including the language incorporating therein the First Mortgage Real Estate Note and Deed of Trust referred to in 10 above. We understand that the Guaranty and Endorsement on the Construction Note will be executed at the closing of your construction loan with Landmark Hotel, Inc. and will survive an assignment of your note to us. We understand that the terms and provisions of the First Mortgage Real Estate Note and Deed of Trust referred to in 10 above will automatically become operative upon an assignment of the Deed of Trust and Note to us from you.

Defendant extended its original commitment to 15 April 1973 "for purposes of facilitating the closing of the construction loan." Plaintiff closed the construction loan to Landmark on 13 April 1973. No representative of defendant was present at the construction loan closing. Plaintiff disbursed \$30,000.00 directly to defendant the same day to obtain a six-month extension of the permanent loan commitment. It disbursed another \$60,000.00 a few days later to extend the permanent loan commitment through 14 October 1974.

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At the closing, Landmark executed a building loan mortgage note in the principal amount of \$6,000,000.00 and delivered it to plaintiff. Attached to the building loan mortgage note as Exhibit A was a first mortgage real estate note in the principal amount of \$6,000,000.00, also executed by Landmark and delivered to plaintiff. The building loan mortgage note provided that if it was purchased by defendants, its terms would be superseded by those of the first mortgage real estate note.

The building loan mortgage note was secured by a construction loan deed of trust executed by Landmark on the same day. Plaintiff was the beneficiary and Sydnor Thompson served as trustee. Attached to the construction loan deed of trust as Exhibit B was a permanent loan deed of trust executed by Landmark. The trustee was Thomas Wharton, who represented the broker acting as an intermediary between plaintiff and defendant. The construction loan deed of trust provided that upon the purchase of the building loan mortgage note and the assignment of the construction loan deed of trust to defendant, the terms of the permanent loan deed of trust would supersede those of the construction loan deed of trust. The construction loan deed of trust, with the permanent loan deed of trust attached as Exhibit B, was recorded in the Buncombe County Office of the Register of Deeds.

Plaintiff advanced \$4,867,249.43 to Landmark from 13 April 1973 to 10 October 1974 under the construction loan. Landmark used the funds to build the hotel and prepare it for doing business. The construction was certified as substantially complete on 10 October 1974.

During construction of the hotel, several events occurred pertinent to the permanent loan commitment. The management contract with MIM appeared to be at an impasse, and MIM and Landmark sued each other for breach of that contract. Landmark ordered MIM to cease performance of its pre-opening duties in March, 1974. MIM notified all concerned parties in July of 1974 that it deemed its obligations to plaintiff and defendant terminated due to Landmark's breach of the management contract. Defendant informed plaintiff that it was worried about the collapse of the management contract and about a lease agreement between Landmark and Orbital Industries, Inc. Neither Landmark nor plaintiff proposed a substitute management company accept-

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able to defendant. The Housing Authority of Asheville refused to issue a certificate of completion, which had been requested, for the hotel in October, 1974.

Landmark was unable to pay all the bills for the hotel on 9 October 1974, and on that day, a representative of Landmark tendered the hotel keys to a representative of plaintiff, who refused to accept them. On 10 October 1974 Landmark closed the hotel due to a lack of operating funds.

Meanwhile, plaintiff informed the intermediary broker, by a letter dated 3 October 1974, that it and Landmark were ready to close the permanent loan with defendant. Plaintiff sent a telegram and a letter, both dated 7 October 1974, to defendant stating that it would tender the first real estate note and deed of trust on 11 October 1974 to defendant. On 11 October 1974 plaintiff sent defendant a telegram giving notice that plaintiff would tender the Landmark loan on 14 October 1974.

On 14 October 1974 representatives of plaintiff arrived at defendant's hometown office prepared to close the permanent loan to Landmark. Defendant refused plaintiff's tender of the construction loan note and deed of trust. Defendant indicated that the terms of the permanent loan commitment had not been met and that the economy was too uncertain for it to finance as risky a venture as the hotel. Plaintiff then asked for an extension of the permanent loan commitment. Defendant refused this request.

Landmark filed a voluntary petition in bankruptcy on 18 November 1974. On 11 February 1976 plaintiff received permission to foreclose its deed of trust. Plaintiff held a public foreclosure sale three months later and was the successful bidder at \$3,000,000.00. Plaintiff subsequently sold the property to its wholly-owned subsidiary, which in turn sold the hotel to Vector Hospitality Associates.

This action was filed on 20 December 1976 by plaintiff. The trial court denied defendant's motion to dismiss for lack of jurisdiction. The trial court's order was upheld on appeal.

The case was then tried before the trial court sitting without a jury. After making findings of fact and conclusions of law, the trial court entered judgment for the defendant. Plaintiff appealed.

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Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Sydnor Thompson, Fred T. Lowrance, and Sally Nan Barber; Herbert Hyde; Van Winkle, Buck, Wall, Starnes & Davis, by Larry McDevitt, for plaintiff.

McCoy, Weaver, Wiggins, Cleveland & Raper, by John E. Raper, Jr., and Richard M. Wiggins, and Redmond, Stevens, Loftin & Currie, by John S. Stevens and Thomas R. West, for defendant.

WELLS, Judge.

Plaintiff first contends that the trial court erred in failing to find and conclude that a contract existed between plaintiff and defendant. Plaintiff also contends that the trial court should have found and concluded that it was a third party beneficiary of defendant's permanent loan commitment. We hold that the trial court did not adequately address these issues.¹

G.S. § 1A-1, Rule 52(a)(1) of the Rules of Civil Procedure requires a trial judge hearing a case without a jury to make findings of fact and conclusions of law. To comport with Rule 52(a)(1), the trial court must make "a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982) (citation omitted). Rule 52(a)(1) does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. *Id.* See also *Farmers Bank v. Michael T. Brown Distributors, Inc.*, 307 N.C. 342, 298 S.E. 2d 357 (1983).

1. In *Chemical Realty Corp. v. Home Federal Savings & Loan Association of Hollywood*, 40 N.C. App. 675, 253 S.E. 2d 621, *disc. rev. denied and app. dismissed*, 297 N.C. 612, 257 S.E. 2d 435 (1979), *app. dismissed*, 444 U.S. 1061, 100 S.Ct. 1000, 62 L.Ed. 2d 744 (1980), we upheld the trial court findings that a contract existed between Home Federal and Landmark. These findings were made solely to establish jurisdiction over the defendant, do not go to the merits of this case or determine the contractual rights of plaintiff and defendant, and therefore do not constitute the law of the case on the respective contractual rights or obligations of plaintiff and defendant.

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Although the letter written by Home Federal to Chemical appears from an agreement supported by consideration by Home Federal to purchase Chemical's construction loan upon compliance with certain conditions precedent, the trial court's only finding of fact with respect to the letter was that "Home Federal, by Wohl, executed an undated letter being Defendant's Exhibit 154 for identification purposes." This finding is an evidentiary fact, not an ultimate fact. The trial court failed to make any finding of fact regarding whether defendant owed any contractual duty to plaintiff. Such findings are necessary to a valid judgment in this action. As the North Carolina Supreme Court has stated,

Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 268 S.E. 2d 185 (1980).

Although the trial court's order contains more than forty-one separate findings of fact,² the evidence, stipulations, and pleadings in the instant case present questions of fact which were ignored in those findings, but which must be resolved before judgment can be entered. On remand, the following issues should be resolved by proper findings and conclusions.

(1) Was there a promise by defendant, supported by consideration, to plaintiff to purchase plaintiff's construction loan?

(2) If defendant made no promise, did defendant's actions provide the basis for plaintiff to become a creditor beneficiary of defendant's permanent loan commitment?

2. We note that some of the trial court's purported conclusions of law are only additional findings of fact.

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(3) If plaintiff contracted with defendant, or had third party beneficiary status, what were the conditions precedent and material terms that had to be complied with before defendant's duty to plaintiff to perform arose?

(4) Were those terms and conditions substantially complied with?

(5) If Landmark and/or plaintiff had not fulfilled the conditions precedent and material terms on 14 October 1974, did plaintiff timely request defendant to extend the permanent loan commitment beyond 14 October 1974?

(6) If plaintiff did make a timely request to extend the permanent loan commitment, to what extent did plaintiff incur foreseeable and ascertainable damages by defendant's refusal to extend?

Defendant contends that even if the trial court failed to make all the necessary findings arising under the evidence, the findings it made adverse to plaintiff and supported by the evidence are sufficient to sustain the trial court's conclusions and judgment. We cannot agree. The trial court's findings having failed to address crucial aspects of the rights and obligations of the parties arising upon the evidence, we can make no assumptions as to what the result will be when the evidence in the case is properly sifted, addressed, and treated at the trial level.

The parties to this appeal have submitted extensive briefs; plaintiff has brought forward a number of exceptions we have not addressed; but we perceive that it would be untimely and unproductive for us to deal with plaintiff's other exceptions because of the obvious need for the heart of this case to be reconsidered at the trial level.

Because we perceive there are no questions raised in the appeal as to admission of evidence or credibility of witnesses, we conclude that it is unnecessary to order a new trial, and that the case may be properly considered on remand on the existing record.

For the reasons stated, the judgment of the trial court must be reversed and the case remanded for further proceedings consistent with this opinion.

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Reversed and remanded.

Chief Judge VAUGHN and Judge JOHNSON concur.

WATSON N. SHERROD, JR., INDIVIDUALLY, MAY HOLTON SHERROD, WIFE OF WATSON N. SHERROD, JR.; WATSON N. SHERROD, JR., IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF WATSON N. SHERROD, SR.; WATSON N. SHERROD, JR., IN HIS CAPACITY AS TRUSTEE UNDER ITEM FOUR OF THE LAST WILL AND TESTAMENT OF WATSON N. SHERROD, SR.; MAY McLAUGHLIN SHERROD, AN UNMARRIED ADULT; ELIZABETH LLEWELLYN SHERROD, AN UNMARRIED ADULT; AND WILLIAM LLEWELLYN SHERROD, AN UNMARRIED MINOR, ACTING BY AND THROUGH JOHN P. MORRIS, HIS DULY APPOINTED GUARDIAN AD LITEM v. ANY CHILD OR CHILDREN HEREAFTER BORN TO WATSON N. SHERROD, JR. AND ANY CHILD OR CHILDREN, BORN OR UNBORN, OR KNOWN OR UNKNOWN WHO MAY HEREAFTER BE ADOPTED BY WATSON N. SHERROD, JR.; ROY A. COOPER, JR., GUARDIAN AD LITEM OF ANY CHILD OR CHILDREN HEREAFTER BORN TO WATSON N. SHERROD, JR.; AND STEPHEN M. VALENTINE (NOW FRANKLIN L. ADAMS, JR.), GUARDIAN OF ANY CHILD OR CHILDREN, BORN OR UNBORN, OR KNOWN OR UNKNOWN WHO MAY HEREAFTER BE ADOPTED BY WATSON N. SHERROD, JR.

No. 827SC1133

(Filed 6 December 1983)

1. Trusts § 1.1— creation of testamentary trust

A devise of a farm to testator's grandchildren with a provision that testator's son should handle the property as he thinks best until the oldest child shall have reached the age of 30 created an active trust.

2. Wills § 35.5— class gift—persons entitled to share

If a class gift is to be distributed at the death of the testator, then regardless of whether the gift is personal or real property, the class closes at the death of the testator. If the gift is personal property and is to be distributed at a later date, the roll is called at the date of distribution.

3. Wills § 35.5— class gift of realty—persons entitled to share

If a gift is real property, there is no intervening life estate, and the property is to be distributed at a later date, the class is closed at the death of testator.

4. Wills § 35.5— trust for granddaughters and afterborns—closing of class of beneficiaries

Where testator devised a farm to his granddaughters and any unborn children of his son with a provision that the son should manage the farm until the oldest child reached the age of 30, the class of beneficiaries closed at the death of testator to the exclusion of afterborn children.

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5. Wills § 41.1— testamentary trust—no violation of rule against perpetuities

A trust created when testator devised a farm to his granddaughters and any unborn children of his son with a provision that the son should manage the farm until the oldest child reached the age of 30 did not violate the rule against perpetuities, since the class closed at the death of the testator, and the interests of the grandchildren were to vest at the testator's death with only full enjoyment to be postponed.

6. Trusts § 6.3— testamentary trust—power of sale

A testamentary trust for testator's grandchildren which gave the trustee the power to handle the only trust asset, a farm, "as he thinks best" and provided that the farm could be used to give "either child a suitable education" gave the trustee the power to sell the farm without approval of the court.

7. Trusts § 6.1— testamentary trust—right to accumulate income or distribute equally

A testamentary trust for testator's grandchildren which gave the trustee the power to handle the only trust asset, a farm, "as he thinks best" and provided that the farm could be used to give "either child a suitable education" gave the trustee the power to distribute income unequally or to accumulate it in his discretion.

8. Declaratory Judgment Act § 4.6— rights under a will—failure of court to adjudicate—remand

Where parties to a declaratory judgment action presented genuine issues regarding rights and liabilities under a will, they were entitled to have them resolved, and where the trial court failed so to adjudicate, the cause will be remanded.

Judge PHILLIPS dissenting.

APPEAL by plaintiffs and defendants Roy A. Cooper, Jr., guardian ad litem, and Franklin L. Adams, Jr., guardian ad litem, from *Rouse, Judge*. Judgment entered 13 July 1982 in Superior Court, NASH County. Heard in the Court of Appeals 19 September 1983.

Appellants appeal from a declaratory judgment interpreting the will of Watson N. Sherrod, Sr.

John E. Davenport for plaintiff appellants.

Valentine, Adams & Lamar, by Franklin L. Adams, Jr., for Franklin L. Adams, Jr., Guardian Ad Litem for any child or children hereafter adopted by Watson N. Sherrod, Jr., defendant appellant.

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Fields, Cooper & Henderson, by Leon Henderson, Jr., for Roy A. Cooper, Jr., Guardian Ad Litem for any child or children hereafter born to Watson N. Sherrod, Jr., defendant appellee and cross appellant.

WHICHARD, Judge.

I.

Plaintiffs brought this declaratory judgment action to interpret Item Four of the Last Will and Testament of Watson N. Sherrod, Sr., which provides:

I will and bequeath to my granddaughters May McLaughlin [sic] Sherrod and Elizabeth Llewellyn Sherrod and any unborn children of my son, Watson N. Sherrod, Jr. my farm located in Nash County, N.C. and known as the Hunter Farm, share and share alike. This bequest to be handled by the children's father Watson N. Sherrod, Jr. as he thinks best until the oldest child shall have reached the age of thirty years unless this bequest shall be needed to give either child a suitable education.

The court determined that this item created an active trust, the beneficiaries of which were the living children of Watson N. Sherrod, Jr. and any children hereafter born to him; that it did not violate the rule against perpetuities; and that it did not include children adopted by Watson N. Sherrod, Jr.

From this judgment, plaintiffs and the guardian ad litem for any child or children hereafter adopted by Watson N. Sherrod, Jr. (hereafter appellants) appeal. The guardian ad litem for any child or children hereafter born to Watson N. Sherrod, Jr. cross appeals.

II.

[1] The first issue is whether the above language creates a trust. The elements of a trust are: "(1) sufficient words to raise it, (2) a definite subject, (3) and an ascertained object." *Thomas v. Clay*, 187 N.C. 778, 783, 122 S.E. 852, 854 (1924), *quoted in Trust Co. v. Taylor*, 255 N.C. 122, 126, 120 S.E. 2d 588, 591 (1961).

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As to sufficiency of the language, our courts consistently have held that "no particular language is required to create a trust relationship if the intent to do so is evident." *Stephens v. Clark*, 211 N.C. 84, 88, 189 S.E. 191, 194 (1937); see also *Y.W.C.A. v. Morgan, Attorney General*, 281 N.C. 485, 490, 189 S.E. 2d 169, 172 (1972). It is evident here that the testator intended to create a trust for his grandchildren. He states that their father is to manage the property until the oldest child reaches the age of thirty. He does not use precatory language. Rather, he mandates that "[t]his bequest [is] to be handled by the children's father." This language suffices to create a trust if the other elements are present. They clearly are. The testator's farm in Nash County is the "definite subject." His grandchildren, as beneficiaries, are the "ascertained object[s]."

A similar case is *Johnson v. Salsbury*, 232 N.C. 432, 61 S.E. 2d 327 (1950). The testator there left part of his estate to his grandchildren and requested that their father be appointed "to act as guardian . . . in handling" the estate. *Id.* at 434, 61 S.E. 2d at 329. The Court held that since the law did not allow a grandfather to appoint a testamentary guardian for his grandchildren, the will should be interpreted as creating a trust for the grandchildren with their father as trustee. See also *Camp v. Pittman*, 90 N.C. 615 (1884).

Item Four here, like the language in the *Johnson* will, creates an active trust.

III.

The next issue is when to call the roll and determine the members of the class of beneficiaries. The court determined that the roll should be called on 1 November 1992, the thirtieth birthday of the testator's oldest grandchild, when by the terms of the will the trust terminates. Thus, any children of Watson N. Sherrod, Jr., whether born before or after the death of the testator, would be included in the class, provided they were born or *en ventre sa mere* prior to 1 November 1992.

[2] Our courts have developed several rules for determining when to call the roll. If the class gift is to be distributed at the death of the testator, then regardless of whether the gift is personal or real property, the class closes at the death of the

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testator. *Clarke v. Clarke*, 253 N.C. 156, 160-61, 116 S.E. 2d 449, 452 (1960); *Robinson v. Robinson*, 227 N.C. 155, 157, 41 S.E. 2d 282, 284 (1947). This is known as the "rule of convenience." *Cole v. Cole*, 229 N.C. 757, 760, 51 S.E. 2d 491, 493 (1949).

If the gift is personal property and is to be distributed at a later date, however, the roll is called at the date of distribution. *Meares v. Meares*, 26 N.C. (4 Ired.) 192, 197 (1843); *Fleetwood v. Fleetwood*, 17 N.C. (2 Dev. Eq.) 222, 223 (1832). The rationale is that "as many objects of the testator's bounty as possible ought to be included, and there is no necessity for ascertaining the owners of the fund until it is to be distributed." *Hawkins v. Everett*, 58 N.C. (5 Jones) 42, 44 (1859); see also *Knight v. Wall*, 19 N.C. (2 Dev. & Bat.) 125, 130 (1836); 1 N. Wiggins, *Wills and Administration of Estates in North Carolina* § 150, at 496-97 (1964).

This rationale of including as many members of the class as possible has been extended to gifts of real property when there is an intervening life estate, so that the roll is not called until the termination of the life estate. *Parker v. Parker*, 252 N.C. 399, 403, 113 S.E. 2d 899, 903 (1960) (quoting *Mason v. White*, 53 N.C. 421, 422 (1862)); *Sawyer v. Toxey*, 194 N.C. 341, 343, 139 S.E. 692, 693 (1927). The explanation is that

the ownership is filled for the time, and there is no absolute necessity to make a peremptory call, for the takers of the ultimate estate, [so] the matter is left open until the determination of the life estate, with a view of taking in as many of the objects of the testator's bounty, as come within the description and can answer to the call, when it is necessary for the ownership to devolve and be fixed.

Walker v. Johnston, 70 N.C. 575, 579 (1874).

[3] If the gift is real property, there is no intervening life estate, and the property is to be distributed at a later date, the class is closed at the death of the testator. *Wise v. Leonhardt*, 128 N.C. 289, 290-91, 38 S.E. 892, 892 (1901). The will in *Wise* provided: "I give and devise to my son Lawrence's children the half of the tract of land where he now lives, to be divided equally among them after the death of my son Lawrence, to have and to hold to them and their heirs in fee simple forever." The Court recognized the above rule that in order to include as many members of the

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class as possible, the court will call the roll at the date of distribution rather than at the death of the testator. It explicitly stated, however, that this rule "does not apply to real estate unless there be an intermediate estate, for life or years, intervening between the death of the testator and the time in the future when the devisees in remainder come into possession of their vested remainders." *Id.* at 290, 38 S.E. at 892.

Wise has been criticized, but not overruled. One commentator has stated that the opinion "was based upon a misapprehension of the metaphysics of title." Long, *Class Gifts in North Carolina*, 22 N.C. L. Rev. 297, 314 (1944). In criticizing the Court's rationale that the class had to close at the testator's death so that the courts would be able to determine who had title, this commentator stated:

Certainly the Court's statement that the title had to be in someone, that it 'could not be in the clouds,' affords no justification for such a holding. If the title cannot be in the clouds or in [the testator's son] it may nevertheless be vested in the three children subject to partial divestment in favor of those later born; the fact that the three children must have the title need not mean that they are to have it indefeasibly. And once this difficulty has been overcome it would seem just as reasonable to admit children born after the death of the testator where there is an express direction for the postponement of the division of the property as to admit them where the intervention of a life estate causes a postponement.

Id. at 313.

This criticism seems valid for several reasons. First, legal title would not be in limbo during the period of trust. Rather, it would be in the trustee; and equitable title would be in the members of the class born prior to the death of the testator. The fact that their title is subject to partial divestment does not mean they do not have it. Second, no inconvenience results from keeping the class open, since distribution cannot occur until a later date. This is especially true here where the testator set a specific date for distribution. Third, keeping the class open until distribution would further the policy of including therein as many people as possible.

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The Supreme Court somewhat diminished the effect of *Wise* in *Cole v. Cole*, 229 N.C. 757, 51 S.E. 2d 491 (1949). It stated that "[r]ules as to the determination of classes are simply rebuttable presumptions." *Id.* at 761, 51 S.E. 2d at 493. The rule always has been, however, that if a contrary intent of the testator clearly appears, that intent prevails.

In *Cole* the will provided: "I will devise and bequeath to my beloved nephews and any other children who may be born to Robert and Peg Cole, my house and lot at 301 Fayetteville together with the contents and the lot west of the home on Fayetteville Road." The Court held that "the language of the will and the circumstances under which it was executed" evidenced an intent to include any child born to Robert and Peg Cole. *Id.* at 763, 51 S.E. 2d at 495. The class thus could not be closed until the death of either Robert or Peg Cole.

[4] We find *Cole* distinguishable, however. The testator here explicitly stated that the trust was to terminate when the oldest grandchild reached thirty. Watson N. Sherrod, Jr. could father a child after his oldest child reached thirty, and it is improbable that the testator intended the class to remain open until Watson N. Sherrod, Jr. died. He may have intended to include all grandchildren born before the thirtieth birthday of the oldest grandchild. Such an intention does not, however, "clearly appear" from "the language of the will and the circumstances under which it was executed." *Id.*

Given the absence of a clear expression of intent, as in *Cole*, we consider *Wise*, though arguably unwise, the controlling authority. We thus hold that the class closed at the death of the testator, to the exclusion of afterborn children; and that the portion of the judgment providing that the beneficiaries include "any children hereafter born to Watson N. Sherrod, Jr." must be vacated.

IV.

[5] The next issue is whether the trust violates the rule against perpetuities, which provides that "[n]o devise or grant of a future interest in property is valid unless the title thereto must vest in interest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the creation of the

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interest." *Joyner v. Duncan*, 299 N.C. 565, 568, 264 S.E. 2d 76, 81 (1980). The rule relates only to the time of vesting, and is not concerned with postponement of possession. *Trust Co. v. Taylor*, 255 N.C. 122, 127, 120 S.E. 2d 588, 592 (1961). A class gift will not violate the rule if it "cease[s] to be subject to open within the period of the rule." *Joyner v. Duncan*, *supra*, 299 N.C. at 573, 264 S.E. 2d at 84; *see also* L. Simes & A. Smith, *The Law of Future Interests* § 1265, at 196 (1956).

We have held that the class closed here at the death of the testator. The will did not contain any provision that only those grandchildren living when the oldest grandchild reached thirty would receive a share. Rather, the language indicates that the interests of the grandchildren were to vest at the testator's death, and only full enjoyment was to be postponed. This interpretation is supported by ample authority. *E.g.*, *Joyner v. Duncan*, *supra*; *Trust Co. v. Taylor*, *supra*; *Robinson v. Robinson*, 227 N.C. 155, 41 S.E. 2d 282 (1947); *Coddington v. Stone*, 217 N.C. 714, 9 S.E. 2d 420 (1940). Since the interests have vested and the class has been closed, the rule against perpetuities has not been violated.

V.

Appellants contend the court erred in concluding that Item Four did not include adopted children. The record establishes that Watson N. Sherrod, Jr. had no adopted children at the time of the testator's death. Our holding that the class of beneficiaries closed at that time effectively eliminates any issue as to the rights of adopted children.

VI.

[6] Appellants contend the court erred in holding that Watson N. Sherrod, Jr. does not have authority to sell the farm except upon approval of the court.

In the absence of authority conferred by the will, . . . a trustee under a testamentary trust has no authority to convey the fee in the land devised. But the power to convey need not be expressly conferred. It may be implied from the context of the will. 54 A.J., 349. It is purely a question of testamentary intent. *Tippett v. Tippett*, 7 A. (2d), 612; 3 Bogert, *Trusts and Trustees*, pt. 2, 558.

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Bank v. Broyhill, 263 N.C. 189, 192, 139 S.E. 2d 214, 216 (1964) (quoting *Hall v. Wardwell*, 228 N.C. 562, 46 S.E. 2d 556 (1948)). The issue thus becomes whether the testator intended to confer the power of sale.

A similar case is *Ripley v. Armstrong*, 159 N.C. 158, 74 S.E. 961 (1912). The testatrix there provided that her husband was to use the property "as he thinks best for the maintenance of our children." The Court held that the language and attendant circumstances implied a power to sell. One of the attendant circumstances was that the land primarily was used for agriculture, and the only way to provide maintenance for the children was to sell the property.

Here, the testator provided that Watson N. Sherrod, Jr. was to handle the property "as he thinks best." The testator also provided that the farm could be used to provide "either child a suitable education." The court specifically found that at the death of the testator, "the Hunter Farm was a large farm tract but had no value other than as a farm." The testator must have known that any income from the farm probably would be insufficient to provide a "suitable education" for three children. We thus hold, pursuant to *Ripley, supra*, that the testator intended to give Watson N. Sherrod, Jr. the power to sell the farm; that Sherrod took this power "under the will," *Ripley*, 159 N.C. at 159, 74 S.E. at 961; and that court approval of any sale thus is not required. The provision of the judgment that "[t]he Trustee does not have the power to sell any part, or all of the Hunter Farm except upon approval of the Court as provided by law" must thus be vacated.

[7] Appellants also contend the provisions that Watson N. Sherrod, Jr. was to handle the property "as he thinks best," and that the farm could be used to provide "either child a suitable education," gave Sherrod the power to distribute income unequally, or to accumulate it, in his discretion. (Emphasis supplied.) We agree, and we thus hold that the provision of the judgment that "[t]he beneficiaries of the Trust are entitled to share equally in the trust income" must be vacated.

VII.

[8] Appellants finally contend that some of the questions presented to the trial court were not answered. G.S. 1-255(3) pro-

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vides that a declaratory judgment action may be brought "[t]o determine any question arising in the administration of [an] estate or trust, including questions of construction of wills and other writings." Our courts will not "determine matters purely speculative." *Little v. Trust Co.*, 252 N.C. 229, 243, 113 S.E. 2d 689, 700 (1960). When parties have a genuine issue regarding rights and liabilities under a will, however, they are entitled to have them resolved; and where the trial court fails so to adjudicate, the cause will be remanded. *Woodard v. Clark*, 234 N.C. 215, 221, 66 S.E. 2d 888, 892 (1951). The parties here presented genuine issues which they are entitled to have resolved, and the cause must be remanded to that end.

VIII.

The portions of the judgment providing that (1) the beneficiaries of the trust include "any children hereafter born to Watson N. Sherrod, Jr.," (2) "[t]he beneficiaries of the Trust are entitled to share equally in the trust income," and (3) "[t]he Trustee does not have the power to sell any part, or all of the Hunter Farm except upon approval of the Court as provided by law" are vacated. Except as vacated, the judgment is affirmed; and the cause is remanded for further proceedings as to the unanswered questions presented by plaintiffs' complaint.

Vacated in part, affirmed in part, and remanded.

Chief Judge VAUGHN concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the devise involved was for the benefit of all the children of the testator's son, regardless of when born; the devise does not authorize Watson N. Sherrod, Jr. to sell his children's farm, though it does authorize him to manage and operate it until the oldest child's thirtieth birthday.

I vote to affirm the declaratory judgment.

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LARRY DELCONTE v. THE STATE OF NORTH CAROLINA

No. 8311SC371

(Filed 6 December 1983)

1. Schools § 14— compulsory school attendance statutes not in direct conflict

The trial court erred in holding that a conflict between G.S. 115C-378 and Article 39 of Chapter 115C is irreconcilable so as to require that the compulsory attendance law be disregarded.

2. Schools § 14— home instruction not qualifying as nonpublic school

The trial court erred in finding that plaintiff's home instruction of his children qualified as a nonpublic school under Article 39 of Chapter 115C. G.S. 115C-555 and G.S. 115C-554.

3. Constitutional Law § 22; Schools § 14— compelling interest in compulsory education outweighing plaintiff's right to educate children at home based on religious beliefs

A trial court erred in holding that, as a matter of law, plaintiff had a constitutionally protected religious belief that requires him to educate his children at home that outweighed the State's compelling interest in compulsory education. Art. I, § 15 and Art. IX, § 3 of the North Carolina Constitution and the First Amendment to the United States Constitution.

APPEAL by defendant from *Battle, Judge*. Judgment entered 14 January 1983 in Superior Court, HARNETT County. Heard in the Court of Appeals 26 August 1983.

Plaintiff brought this action seeking relief from the North Carolina Compulsory Attendance Law (N.C.G.S. 115C-378). He sought declaratory judgment and injunctive relief which would permit him to educate his children through home instruction in lieu of attendance at a public or private school.

At trial without a jury, plaintiff offered evidence tending to show the following: Plaintiff and his wife have lived in Harnett County, North Carolina, since March of 1981. The Delcontes have two school age children and two younger children. Mr. Delconte graduated from college and is presently employed as a machinist. Mrs. Delconte is a high school graduate who attended college for one year. She does not work outside the home.

Before moving to North Carolina, the Delcontes lived in New York. While there, they became associated with a non-denominational, fundamentalist Christian group. Some members of this

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group sent their children to public schools while some sent their children to private schools. The Delcontes are deeply religious people who believe that the Bible commands that parents teach and train their children at home. While in New York, the Delcontes requested and received permission from the local board of education to teach their two school age children at home. Since moving to North Carolina, they have continued to teach their children at home. Mr. Delconte testified that his objections to public schools were both religious and "sociopsychological."

The instruction that the Delcontes provide for their children covers basic reading, writing, and arithmetic skills. In addition, chores, playtime, and Bible study are part of the children's day. A room has been set aside in the Delcontes' home as a classroom, equipped with textbooks, a blackboard and desks. The Delcontes determine the level and type of instruction for their children by reference to the instruction provided to children of similar age in public and private schools. Mrs. Delconte provides most of the instruction. She uses textbooks, workbooks, and other educational materials obtained from the State of New York and from Wake Christian Academy. The Delcontes' instruction for their children continues during most of the year.

The Delconte children have been tested at Wake Christian Academy by taking a national standardized test, the Metropolitan Achievement Battery. The results indicate that each of the children are learning at approximately the 75th percentile for their grade, except in the area of mathematics, where there is some weakness. These results indicate that the Delconte children are being taught the basics of reading, mathematics, language skills, science and social studies.

In the summer of 1981, several months after the Delcontes moved to North Carolina, the principal of the local public elementary school visited the Delcontes to discuss the status of their two school age children. After that conversation, Mr. Delconte advised the Superintendent of Harnett County Schools that he wished to continue educating his children at home because of his family's religious beliefs.

On 1 September 1981 Mr. Delconte wrote to Mr. Calvin R. Criner, the coordinator for the Office of Nonpublic Education for the State of North Carolina, and requested approval of his home

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as a school for the education of his children. Accompanying this letter, Mr. Delconte sent all the information required by law to be submitted by one seeking to operate a nonpublic school. Mr. Delconte named his school the Hallelujah School. Mr. Criner responded on 4 September 1981 informing Mr. Delconte that the Hallelujah School could not be acknowledged as a nonpublic school "within the meaning of the law," because of an Attorney General's opinion which found that home instruction could not qualify as an approved nonpublic school.

Mr. Delconte was subsequently prosecuted for violating the North Carolina Compulsory Attendance Law, but these criminal charges have been voluntarily dismissed. Mr. Delconte then filed his complaint seeking declaratory judgment and injunctive relief from the Compulsory Attendance Law.

The trial judge ruled in favor of plaintiff that the Hallelujah School should be recognized as a valid nonpublic school, that attendance at the Hallelujah School satisfies the Compulsory Attendance Law, and that, even if the Hallelujah School were not a valid nonpublic school, the Compulsory Attendance Law would be unconstitutional as applied to the plaintiff and could not be enforced against him.

From this judgment, the State appeals.

Attorney General Edmisten, by Special Deputy Attorney General Edwin M. Speas, Jr., for the State.

Thomas E. Strickland for plaintiff-appellee.

EAGLES, Judge.

Plaintiff contends, and the trial court found, that the home instruction he provides for his children complies with North Carolina's compulsory attendance laws and that his right to educate his children at home is constitutionally protected.¹ We disagree and reverse.

1. In his brief, plaintiff relied on a United States District Court decision in favor of another plaintiff parent in an action alleging that North Carolina's compulsory attendance law infringed on his religious beliefs. That case was on appeal from the Eastern District of North Carolina at the time of this action in superior court. The United States Court of Appeals for the Fourth Circuit has since reversed the District Court's judgment. *Duro v. District Attorney*, 712 F. 2d 96 (4th Cir. 1983).

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I.

North Carolina's compulsory attendance law compels every parent, guardian or person having charge of school age children to send those children to school for a time period equal to the time which public schools are in session. G.S. 115C-378. The statute defines "school" to include "all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education." *Id.*

Article 39 of Chapter 115C concerns nonpublic schools. Part 1 of Article 39 sets out the requirements for private church schools and schools of religious charters, and Part 2 sets out the requirements for qualified nonpublic schools. Attendance at these schools regulated by Article 39 satisfies the compulsory attendance laws, provided that the schools maintain attendance and immunization records, operate at least nine months a year, and conform to fire, health and safety standards. G.S. 115C-548 and G.S. 115C-556. Plaintiff presented evidence that he has met all of these requirements. The trial court found that the compulsory attendance law was in direct conflict with Article 39, that the compulsory attendance law must yield to the provisions of Article 39, and that plaintiff's home qualified as a nonpublic school under Article 39.

[1] The trial court erred in finding that G.S. 115C-378 is in direct conflict with and must yield to the provisions of Article 39. It is true that G.S. 115C-378 allows compliance with compulsory attendance requirements by attendance at nonpublic schools with teachers and curricula approved by the State Board of Education, while Article 39 of Chapter 115C allows compliance with compulsory attendance requirements by attendance at nonpublic schools with no mention of approval by the State Board of Education. While there seems to be some conflict between G.S. 115C-378 and Article 39 of Chapter 115C, repeal of G.S. 115C-378 may not be implied. Statutes dealing with the same subject matter will be reconciled and effect given to all where possible. *Comm'r of Insurance v. Automobile Rate Office*, 294 N.C. 60, 67, 241 S.E. 2d 324, 329 (1978). We hold that the trial court erred in holding that the conflict between these statutes was irreconcilable so as to require that the compulsory attendance law be disregarded in this case.

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[2] The trial court also erred in finding that plaintiff's home instruction qualified as a nonpublic school under Article 39 of Chapter 115C. Plaintiff's home instruction of his children does not qualify under Part 1 of Article 39 as a private church school or a school of religious charter. Mr. Delconte testified that his family is not part of any church or organized religious group. There are no facts to show that the Delcontes' home school is "operated by any church or other organized religious group or body as part of its religious ministry." See G.S. 115C-554. Plaintiff contends, based on Part 2 of Article 39, that the Hallelujah School meets the requirements for qualified nonpublic schools. Attendance at a "qualified nonpublic school" meets the requirements of compulsory school attendance. G.S. 115C-556. There is no North Carolina case interpreting the term "school" in this statute, but the majority of other jurisdictions hold that home instruction cannot reasonably be considered a school. See, *State v. Riddle*, 285 S.E. 2d 359 (W. Va. 1981); *City of Akron v. Lane*, 65 Ohio App. 2d 90, 416 N.E. 2d 642 (1979); *F. & F. v. Duvall County*, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); *State v. Garber*, 197 Kan. 567, 419 P. 2d 896 (1966), *cert. denied*, 389 U.S. 51, 88 S.Ct. 236, 19 L.Ed. 2d 50 (1967); *State v. Lowry*, 191 Kan. 701, 383 P. 2d 962 (1963); *In Re Shinn*, 195 Cal. App. 2d 683, 16 Cal. Rptr. 165 (1961).

Although Part 2 of Article 39 does not define "school," it does list the types of schools which qualify as nonpublic schools:

The provisions of this Part shall apply to any nonpublic school which has one or more of the following characteristics:

- (1) It is accredited by the State Board of Education.
- (2) It is accredited by the Southern Association of Colleges and Schools.
- (3) It is an active member of the North Carolina Association of Independent Schools.
- (4) It receives no funding from the State of North Carolina.

G.S. 115C-555. All schools described by subsections (1), (2), and (3) would be established educational institutions. Subsection (4) is a general term following a list of specific terms. The rule of *ejusdem generis* dictates that "where general words follow a

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designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." *State v. Fenner*, 263 N.C. 694, 697, 140 S.E. 2d 349, 352 (1965). Therefore, we hold that G.S. 115C-555(4) refers only to established educational institutions. We reject plaintiff's contention that his home school is a qualified nonpublic school merely because it receives no state funds.

The trial court's holding that plaintiff's home instruction qualified as a nonpublic school is also at odds with the Attorney General's formal opinions on the subject of home instruction. In 1969 the Attorney General advised the State Board of Education that home instruction "does not meet the requirements of the Compulsory Attendance Law." 40 N.C.A.G. 211, 212 (July 3, 1969). This opinion was based on a statutory framework that required private schools to meet various standards regarding qualifications of teachers, the course of study, and the grading and promotion of pupils. In 1979, the General Assembly eliminated all standards relating to the qualifications of teachers and content of the curriculum by enacting the legislation that is now codified as Article 39 of Chapter 115C. Under this statutory framework, the Attorney General again gave his formal opinion that parents could not comply with the requirements of the compulsory attendance laws by educating their children at home. 49 N.C.A.G. 8 (August 9, 1979). In light of these long-standing formal opinions by the Attorney General, and in the absence of legislative action in response to those opinions expressly to permit home instruction as a means of complying with compulsory attendance laws, we hold that "school" means an educational institution and does not include home instruction.

II.

[3] This case presents both state and federal constitutional issues. There are two state constitutional provisions that must be considered in construing any legislation concerning education in North Carolina. Article 1, Section 15 of the North Carolina Constitution provides: "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." Article 9, Section 3 provides: "The General Assembly

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shall provide that every child of appropriate age and of sufficient ability shall attend the public schools, unless educated by other means." In regard to compulsory attendance laws, we read these state constitutional provisions as directing that compulsory attendance requirements can be met in public schools or private schools only as expressly permitted by the General Assembly. Because Article 39 does not expressly permit home instruction, the State's duty to "guard and maintain" each child's right to an education cannot be met by allowing home instruction to fulfill compulsory attendance requirements.

Although the First Amendment to the United States Constitution prevents a state prohibition or restriction on the free exercise of religion, a state may regulate one's freedom to act pursuant to one's religious beliefs. *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). In order to determine whether a state is unconstitutionally infringing a citizen's First Amendment right, a court must determine: (1) whether a sincere religious belief exists and is infringed by the state, and (2) if so, whether there is a state interest of "sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S.Ct. 1526, 1532, 32 L.Ed. 2d 15, 24 (1972). The trial court here erred in holding that plaintiff has a protected religious belief that requires him to educate his children at home and that the state's interest in educating his children does not override plaintiff's interest in educating his children at home.

Mr. Delconte testified that his decision to teach his children at home was based on religious factors *and* on "sociopsychological" factors. He admitted, "I can't answer the question of whether I would send my children to public or private schools if my sociopsychological objection to schooling outside the home changed." An action based on philosophical or personal beliefs is not protected by the Free Exercise Clause. *Id.* at 216, 92 S.Ct. at 1533, 32 L.Ed. 2d at 25. Mr. Delconte's testimony shows that, even in his own mind, it is not clear that his objection to schooling outside the home is based on religious beliefs. Although it is clear that Mr. Delconte is a man with sincerely held religious beliefs, the trial court erred in finding, as a matter of law, that Mr. Delconte's belief that his children should be instructed at home is constitutionally protected.

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Assuming, *arguendo*, that plaintiff had a protected belief, we hold that the state has an overriding interest in assuring that plaintiff's children are educated. The State of North Carolina has a compelling interest in providing access to education for all, in order to prepare future citizens to "participate effectively and intelligently in our political system" and to "prepare individuals to be self-reliant and self-sufficient." *Id.* at 221, 92 S.Ct. at 1536, 32 L.Ed. at 29. The State has no means by which to insure that children who are at home are receiving an education. Therefore, the State's interest in compulsory education outweighs plaintiff's interest in educating his children at home because of religious and sociopsychological beliefs. The trial court erred in holding that, as a matter of law, plaintiff had a constitutionally protected religious belief that outweighed the State's compelling interest in compulsory education.

Reversed.

Judges WHICHARD and JOHNSON concur.

IN THE MATTER OF CHRISTOPHER L. NORRIS, A MINOR MALE CHILD

No. 8211DC1230

(Filed 6 December 1983)

1. Parent and Child § 1.5— termination of parental rights—absence of counsel at hearing on child neglect

Whether respondents in a proceeding to terminate parental rights were represented by counsel during an earlier hearing in which the child was adjudicated a neglected child was of no importance where the court did not rely on the prior adjudication as grounds for terminating parental rights.

2. Parent and Child § 1.6— termination of parental rights—technical error not prejudicial

Respondents in a proceeding to terminate parental rights were not prejudiced by a technical error in a finding by the trial court as to the date a homemaker observed the child appearing nervous and afraid of his mother.

3. Parent and Child § 1.6— termination of parental rights—finding of adoptability unnecessary

A finding of adoptability is not required in order to terminate parental rights.

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4. Parent and Child § 1.6— termination of parental rights—neglect of child

There was sufficient evidence that a child did not receive proper care, supervision or discipline from his natural parents and that the parents' home environment was injurious to his welfare to support the court's determination that respondents had neglected their child within the meaning of G.S. 7A-289.32(2) and that their parental rights should be terminated.

5. Parent and Child § 1.5— termination of parental rights—standard of neglect

The standard of neglect to be applied under G.S. 7A-289.32(2) in a proceeding to terminate parental rights is not unconstitutionally vague.

6. Parent and Child § 1.6— termination of parental rights—failure to pay reasonable portion of cost of care

The evidence was sufficient to support the trial court's determination that respondent father's parental rights should be terminated because of his failure to pay a reasonable portion of the cost of care for the child within the meaning of G.S. 7A-289.32(4) where it showed that the father was under court order to pay \$15.00 per week for support of the child; respondent made only one payment of \$30.00 on the date of a review hearing during the six months preceding filing of the petition; and respondent had the financial ability to pay in at least four of the six months preceding the filing of the petition.

APPEAL by respondents from *Greene, K. Edward, Judge*. Judgment entered 27 May 1982 in District Court, HARNETT County. Heard in the Court of Appeals 19 October 1983.

Respondents, parents of four-year-old Christopher Lynn Norris, appeal an order entered pursuant to G.S. 7A-289.32 to terminate parental rights.

The pertinent facts are as follows:

Christopher Lynn Norris was born on 31 January 1978 to respondents, Debbie Hardison Norris and Terry Lynn Norris. On or about July, 1978, when Chris was approximately six months old, he was adjudicated a neglected child and placed in foster care, under the supervision of petitioner, Harnett County Department of Social Services.

On 21 December 1979, custody of Chris was returned to respondents under the supervision of petitioner. In January, 1981, petitioner offered homemaker services to respondents. A homemaker from Social Services visited and observed respondent, Debbie Norris, on several occasions.

On 16 January 1981, the homemaker arrived at around 2:00 p.m. and found Chris in bed, begging to get up. He appeared nerv-

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ous and was pinching his lips until they bled. Mrs. Norris screamed at him to stop such behavior. During this visit, the homemaker observed a blue spot on the child's buttocks. There were no fluids in the home and the homemaker bought orange juice, milk and other items for the home.

On her next visit, 21 January 1981, the homemaker arrived at the Norris home at around 10:15 a.m. and found Chris in bed again, begging to get up. His legs, from the knees down, were cold and blue and purple in color. His bedding and clothing were wet. The homemaker showed Mrs. Norris how to use warm water to massage the child's legs and bring back the proper color.

On 22 January, at around 2:15 p.m., the homemaker returned to find the child in bed again, wearing dirty clothing that smelled of urine. Chris was begging his mother for water, but Mrs. Norris told him that he could not have any and that she was tired of his wetting his pants. Upon the homemaker's request, Mrs. Norris bathed Chris. When Chris was put into the hot soapy water, he began lapping up the water and Mrs. Norris spanked him for such behavior. The homemaker explained that Chris needed liquids, but when she suggested that Mrs. Norris give Chris some orange juice, Mrs. Norris responded that the orange juice belonged to Pam, a younger child.

The homemaker next returned on 25 March 1981, at around 10:00 a.m. and again found Chris in bed. When Chris got up, he fell three times, and his mother made no attempt to help him. Chris was wet and had a cold. Again, the homemaker observed that his legs were purple and blue. When the homemaker suggested that Chris have clean clothes, Mrs. Norris brought wet clothes to the homemaker.

On 26 March 1981, the homemaker and a social worker went to a neighbor's house where Chris had stayed the previous night. Chris had been well cared for at the neighbor's house and his legs were no longer blue and purple.

Although Mrs. Norris showed her younger daughter love and affection, she rejected Chris. She stated that she had really wanted a girl and that girls could be dressed up and loved.

On 30 March 1981, Chris was adjudicated a neglected child and custody was given to petitioner. From 30 March 1981 until

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the date of trial, 16 April 1982, Chris had been in foster care. While Chris was in foster care, the Norrises had the right to visit Chris twice each month. The parents did not visit, however, until June, 1981, three months after the child's removal. On 11 February 1982, respondents were served with the Petition for Termination of Parental Rights. Although Mrs. Norris said that she had changed since Chris was removed, she had thereafter quit counseling and had visited Chris only seven times between 26 March 1981 and 11 February 1982, even though a total of twenty-one visits had been available.

At the hearing on 30 March 1981, Mr. Norris was ordered to pay \$15 per week for support of Chris. He did not make any payments until the date of a review hearing on 6 June 1981. He thereafter made payments on 15 June 1981 and on 4 September 1981, the day of the second review hearing. On 11 September 1981, when the third review hearing was held, Mr. Norris had made no further payments. In all, from March, 1981 until the trial in May, 1982, only \$60 was contributed in support of Chris.

In 1981, Mr. Norris earned about \$4,285.00 as a brick mason. The following summary shows an approximate breakdown of monthly earnings:

January 1981	\$ 231.50 gross
February 1981	337.50 gross
March 1981	429.50 gross
April 1981	486.86 net
May 1981	321.44 net
June 1981	346.66 net
July 1981	462.69 net
August 1981	345.50 gross
September 1981	376.50 gross
October 1981	485.75 gross
November 1981	380.00 gross
December 1981	81.00
	<hr/>
	\$4,284.90

In addition to his work income, the Norrises received food stamps of \$52 to \$183 per month and AFDC of about \$152 per month. Mr. Norris stated that he could not make support payments because he was burdened by other expenses. Other ex-

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penses included rent of \$150 per month, an electric bill of \$60 per month, car expenses of \$25 per week, a heat bill of \$25 per week (during winter), and certain other grocery expenses. Easing these financial burdens were several factors: First, respondents rented from their grandparents, who stated that respondents would not be evicted if they missed some rent payments. Second, Mr. Norris' employer would have loaned him money to meet his support obligation had he been asked. Third, on 9 September 1981, Mr. Norris had agreed to notify the county of any difficulty in meeting his obligation; he never did so.

In foster care, Chris changed from a nervous child to an adjusted, happy child. His nervous lip-biting condition disappeared apart from his natural parents. Petitioner, as part of its permanency planning program, identified Chris as a child who could benefit from a stable home environment and as a highly adoptable child, being only four years old and well-adjusted.

Based on these facts, the trial court concluded as a matter of law that respondents had neglected their child pursuant to G.S. 7A-289.32(2) and that Mr. Norris had failed to pay a reasonable portion of child care for a continuous period of six months preceding the filing of the petition, pursuant to G.S. 7A-289.32(4). The Court concluded that terminating parental rights under G.S. 7A-289.31 was in the best interests of the child. Custody was given to petitioner, with authorization to immediately place the child in the home of prospective adoptive parents.

Bain and Capps, by Elaine F. Capps, for appellants respondents.

Woodall, McCormick and Felmet, P.A., by Edward H. McCormick, for petitioner appellee.

VAUGHN, Chief Judge.

Pursuant to G.S. 7A-289.30(e), findings of fact by the Court in a hearing on termination of parental rights must be based on clear, cogent and convincing evidence. Respondents contend that the evidence presented did not meet this standard. We disagree.

We have already summarized at length the trial court findings and other facts from the Record. Upon review of the testimony at trial and the Record, we conclude that such findings

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were based on clear, cogent and convincing evidence. We deal separately with each of respondents' exceptions to the trial court findings.

[1] First, respondents contend that the trial court's finding regarding a 1979 hearing wherein Christopher was adjudicated a neglected child was based on incompetent evidence since respondents were not represented by counsel during such hearing. This contention, though asserted in respondents' brief is not supported anywhere in the Record. Matters discussed in the brief outside the Record are not properly considered on appeal since the Record imports verity and binds the reviewing court. *State v. Hedrick*, 289 N.C. 232, 221 S.E. 2d 350 (1976). In any event, regardless of whether respondents had counsel in 1979, their contention is meritless since the Court had before it plenary evidence and did not rely on the prior adjudication as grounds for terminating parental rights.

[2] In respondents' next Assignment of Error, they contend that the Record is devoid of evidence to support the Court's finding of fact that on 21 January 1981, the homemaker observed Chris appearing nervous and afraid of his mother. A careful review of the Record reveals that the relevant date was not 21 January, but rather, 16 January, that Ms. Thomas described Chris as appearing "real nervous and he'd sit there and he'd clench his lips, he had a habit of clinching his lips, until he broke the skin on his lips."

It is well recognized that technical errors will not authorize a new trial unless it appears that the objecting party was prejudiced thereby, and the burden is on him to show prejudice. *Hines v. Frink and Frink v. Hines*, 257 N.C. 723, 127 S.E. 2d 509 (1962). Respondents have not shown that they were prejudiced by the technical error regarding the date of such observation. We find no reasonable probability that the results of the trial would have been favorable to respondents had such error not occurred. See *Mayberry v. Coach Lines*, 260 N.C. 126, 131 S.E. 2d 671 (1963).

Respondents next challenge the Court's findings of fact in that such findings excluded other relevant evidence. Specifically, respondents point out that Mrs. Norris had neither a driver's license nor a telephone to help arrange visits with her son; that visitation increased following the filing of the petition; and that in 1982, Mr. Norris' income was lower. Pursuant to G.S. 7A-289.30(a),

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the trial court, in the instant case, acted as both judge and jury. Our scope of review, when the Court plays such a dual role, is to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts. *Hensgen v. Hensgen*, 53 N.C. App. 331, 280 S.E. 2d 766 (1981); *Blanton v. Blanton*, 40 N.C. App. 221, 252 S.E. 2d 530 (1979). We have already found that the Court's findings of fact were supported by clear, cogent and convincing evidence. The findings of fact by the trial court in a nonjury trial have the force and effect of a jury verdict and are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings. *Hensgen v. Hensgen, supra*; see *Taylor v. Jackson Training School*, 5 N.C. App. 188, 167 S.E. 2d 787 (1969).

[3] Respondents next challenge the trial court's finding of fact that Chris was highly adoptable. Respondents urge us to adopt the reasoning from the dissenting opinion in *In re Moore*, 306 N.C. 394, 406, 293 S.E. 2d 127, 134 (Carlton, J. dissenting), *pet. denied*, 306 N.C. 565 (1982), *appeal dismissed*, --- U.S. ---, 103 S.Ct. 776, 74 L.Ed. 2d 987 (1983), wherein Justice Carlton argued that the county should have the burden of proving adoptability before the Court can terminate parental rights. It suffices to say that such a finding is not required in order to terminate parental rights. See G.S. 7A-289.32.

The trial court concluded, as a matter of law, that respondents had neglected Chris pursuant to G.S. 7A-289(32)2. Respondents now contend that the trial court had before it insufficient evidence to support this conclusion. Respondents' contention is without merit.

[4] The standard for neglect in termination proceedings is found in G.S. 7A-517(21). Pursuant to such statute, a neglected juvenile is:

[a] juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian or caretaker; who had been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of the law.

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We need not reiterate the evidence adduced at trial showing that Chris did not receive proper care, supervision or discipline from his natural parents and that the Norris' home environment was injurious to his welfare. There was plenary, competent evidence to support the trial court's decision to terminate parental rights pursuant to G.S. 7A-289.32(2) and G.S. 7A-517(21).

[5] Respondents contend that the standard of neglect to be applied under G.S. 7A-289.32(2) is unconstitutionally vague. Our courts have recently considered this question and found such standard to be constitutional, its meaning clear. *In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236, 22 A.L.R. 4th 766 (1981).

[6] The trial court also found, as part of its legal conclusions, that Terry Norris had failed, pursuant to G.S. 7A-289.32(4), to pay a reasonable portion of the cost of care for his child. Respondents challenge this conclusion. The facts, as found by the trial court, showed that although under court order to pay \$15 per week, Mr. Norris paid a total of only \$60 in child support since Chris was placed in foster care on 1 April 1981 until the filing of the petition on 11 February 1982. Respondent contends that he was financially unable to meet his support obligation. In light of the evidence adduced at trial, we disagree.

A determination of a reasonable portion of child support is based on an interplay of the amount of support necessary to meet the reasonable needs of the child and the relative ability of the parents to provide that amount. *In re Biggers, supra*. The Court determined that \$150 per month was necessary to support Chris' reasonable needs. Respondent was under Court order to pay 40% of this amount or \$60 per month. Respondent's monthly income, meanwhile, ranged from a high of \$486.86 in April, 1981 to a low of \$81 in December, 1981. While it would be unreasonable to expect respondent to afford \$60 for child support in December, it was not unreasonable for him to contribute this amount during the rest of the year when his monthly income was over \$300. Respondent, furthermore, had signed a written agreement on 9 September 1981 to inform the county if he had any difficulty meeting his obligation; he never did so.

Pursuant to G.S. 7A-289.32(4), a Court may terminate parental rights if the parent has failed for a period of six months preceding the filing of the petition to pay a reasonable portion of

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the cost of care for the child. The petition in the instant case was filed in February, 1982. There was no evidence at trial as to respondent's income in January, 1982. His income during each of the months of August through November, however, was well over \$300. Yet during this time, respondent made only one payment of \$30 on 11 September, the date of a review hearing. In light of Chris' reasonable financial needs and respondent's ability to pay in at least four of the six months preceding the filing of the petition, we find no error in the trial court conclusion that respondent failed to pay a reasonable portion of child care costs.

For the reasons stated, the Order is affirmed.

Affirmed.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. BILL ELLIS GATES

N. 8325SC59

(Filed 6 December 1983)

1. Criminal Law § 29.1— capacity to stand trial—sufficiency of hearing

The requirements of G.S. 15A-1002 which requires a hearing to determine defendant's capacity to proceed to trial when his capacity is questioned was complied with where defendant's motion for an evaluation to determine his capacity to stand trial was made during a recorded conference in the judge's chambers; the only evidence offered in support of the motion were statements by defendant's counsel that he and defendant had not had meaningful communication and defendant's own statements concerning his drug use and marital problems prior to his arrest; no medical evidence was offered or presented; and in spite of his initial indication, counsel for defendant never made his motion in open court. Although the better practice is for the trial court to make findings and conclusions when ruling on a motion under G.S. 15A-1002(b), it is not error for the trial court to fail to do so where the evidence would have compelled the ruling made, and the transcript of the conference in chambers indicates that defendant was fully able to stand trial and to cooperate with his attorney and aid in his defense.

2. Criminal Law § 86.5— inquiry into defendant's drug use—permissible to impeach character

In a prosecution for forgery and uttering forged instruments, the trial court did not err in allowing the State to inquire into the details of defendant's

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drug use on cross-examination since the State's cross-examination was not concerned with the details of the offenses of which defendant was previously convicted, but rather, the State's questions sought information concerning defendant's drug use subsequent to those prior convictions.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 19 August 1982 in Superior Court, CATAWBA County. Heard in the Court of Appeals 27 September 1983.

Defendant was charged with 21 counts of forgery and 21 counts of uttering a forged instrument. Prior to trial, there was a recorded in-chambers discussion concerning a plea arrangement at which defendant and his counsel, the prosecutor, and the judge were present. During this discussion, counsel for defendant made a motion for an evaluation of defendant's capacity to stand trial. After some discussion of the grounds for the motion, the judge indicated that the motion would be denied. On his plea of not guilty, defendant was then tried before a jury on 21 charges of forgery and 3 charges of uttering.

Defendant testified at trial and, during cross examination, admitted that he had been convicted of the offenses of sale and delivery of a controlled substance and possession of a controlled substance with intent to sell and deliver. Defendant also admitted to using the drugs talwin and dilantin on a regular basis. Following these admissions by defendant, the prosecution, over objection, was permitted to inquire into defendant's drug use: how the drugs were administered, where and from whom defendant procured the drugs, and how much he spent on them.

Defendant was found guilty of two counts of forgery and two counts of uttering and was sentenced to four consecutive prison terms of two years each. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Assistant Appellate Defender Nora B. Henry for defendant appellant.

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EAGLES, Judge.

I

[1] Defendant first assigns error to the trial court's denial, without a hearing, of his motion for an evaluation to determine his capacity to stand trial.

G.S. 15A-1002 provides as follows:

(b) When the capacity of the defendant to proceed is questioned, the court:

. . . .

(3) Must hold a hearing to determine defendant's capacity to proceed.

In this case, the question as to defendant's capacity to proceed was raised by motion during the discussion in the judge's chambers and considered as follows:

MR. CUMMINS: . . . Bill [defendant] has become intent on getting a pretrial evaluation. I am going to move the court at this time that he be given a pretrial evaluation. Bill and I do not communicate well any more. In fact Bill and I don't communicate at all right now. We talk to each other but there is no transfer of ideas and he is not very receptive to my ideas and in open court I intent [sic] to move that Bill be given an opportunity to undergo pretrial evaluation.

MR. BARROWS: is [sic] that for the purpose of determining his competency [sic] to stand trial? And to assist in his preparation of his defense?

MR. CUMMINS: That is correct.

COURT: You are talking about the motion under 15A 1002.

MR. CUMMINS: That is correct. Bill and I are not having meaningful dialog [sic] at this point and have not been for the last week or the last little while. May be longer than that.

MR. BARROWS: Let me inform the court that the state will oppose that motion. We see the only purpose for that is delay and we see no evidence of any indication that he has any mental inability to assist his counsel and to help prepare

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his defense or that he was not able to tell right from wrong and the nature and quality of his acts at the time that the crimes were committed.

MR. CUMMINS: According to my conversatio [sic] with my client, well, not at this time for he has been in jail for five months, but before that time he was a heavy user of drugs.

COURT: What drugs?

MR. CUMMINS: Dilatin [sic] and talwin.

MR. GATES [defendant]: If you want to see them I will show yo [sic] my arms if you want to see them. I was on it for better than four years and about the worse that I ever did and I am not proud of it. I am glad in a way I was arrested for it might have saved my life you know.

COURT: You are not saying you have been [on] drugs while in jail are you?

MR. GATES: No sir. I got on talwin when I was convicted about five years ago and I done three years sentence and that is when I got the drugs when I was in prson [sic] in Newton.

COURT: What I am saying you have not had any drugs while in the Catawba County Jail?

MR. GATES: No sir. I have been off of them every [sic] since I was arrested you know.

COURT: And how far did you go in school?

MR. GATES: I didn't finish the tenth grade.

COURT: You get any training while you were in prison?

MR. GATES: I just worked, you know on work release.

COURT: What did you do.

MR. GATES: I worked at Deville Furniture.

COURT: Furniture factory here?

MR. GATES: Yes, In Hickory.

COURT: What do you feel an examination in Raleigh would possibly produce?

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MR. GATES: it [sic] would show, I mean, how do you put it in words, show that for the last, you know, before Christmas that my wife and I had problems and she was taking the kid and going back and forth and it was driving me over the edge and I had a drug problem bad and I didn't realize it at the time and I was really doing and I needed help, you know then. . . .

. . . .

MR. BARROWS: . . . We don't seem to be able to come to a plea arrangement that he can live with.

COURT: Okay, we will go and try it. Anything else you want to say.

MR. GATES: No sir.

COURT: On the motion for commitment for a [sic] evaluation, I just don't see any value tha [sic] will come from that and I am going to deny it and proceed with the trial today as planned. [Defendant's exception No. 1]. . . .

The State contends that this discussion in chambers satisfies the hearing requirement of G.S. 15A-1002(b)(3) and that defendant's motion was properly denied.

Prior to the enactment of G.S. 15A-1002 in 1975, no hearing was required when a defendant's capacity to proceed was brought into question. G.S. 122-83 through 122-91 (1974). In the absence of a legislatively prescribed method for conducting such inquiries, the courts were governed by the common law. The method of inquiry was within the discretion of the trial judge, the only requirement being that defendant be accorded due process of law. *State v. Sullivan*, 229 N.C. 251, 49 S.E. 2d 458 (1948); *State v. Lewis*, 11 N.C. App. 226, 181 S.E. 2d 163, cert. denied and appeal dismissed, 279 N.C. 350, 182 S.E. 2d 583 (1971); see G.S. 122-83 (1974) ("it shall be ascertained by due course of law that such person is mentally ill and cannot plead, . . ."). [Emphasis added.]

State v. Gray, 292 N.C. 270, 233 S.E. 2d 905 (1977), decided under the former law, is similar in several respects to the present case. In *Gray*, defendant moved the court for an evaluation of his capacity to stand trial. Upon inquiry by the court, defendant's counsel gave as evidence of defendant's incapacity the fact that

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he and defendant had been unable to communicate for a week to ten days. The defendant interjected that counsel had failed to see him for a week prior to trial, urging only that defendant accept a proffered plea bargain. Defendant complained of the "informality of the inquiry." *Id.* at 288, 233 S.E. 2d at 917. The court, however, held that there was "nothing amiss in the procedure utilized by the court in hearing and ruling on this question." *Id.* at 289, 233 S.E. 2d at 917.

Although the present statute requires the court to conduct a hearing when a question is raised as to a defendant's capacity to stand trial, no particular procedure is mandated. The method of inquiry is still largely within the discretion of the trial judge.

In *State v. Woods*, 293 N.C. 58, 235 S.E. 2d 47 (1977), the Supreme Court affirmed the trial court's denial of defendant's motion for a pretrial evaluation under G.S. 15A-1002 even though "[t]he record is not entirely satisfactory as to whether and to what extent defendant was accorded a hearing." *Id.* at 64, 235 S.E. 2d at 50. Relying only on the indication from defendant's counsel that defendant did not wish to present evidence and on defendant's failure to complain about the lack of a hearing, the court there held that "the trial court considered all information relative to defendant's capacity . . ." and ruled that the requirements of G.S. 15A-1002(b)(3) were satisfied. *Id.*

State v. Williams, 38 N.C. App. 183, 247 S.E. 2d 620 (1978), reached a similar conclusion as to the hearing requirement of G.S. 15A-1002(b)(3):

The defendant produced no evidence in support of her motion other than counsel's statements that the defendant had indicated to him that she was not able to assist in the defense of her case. It is apparent from the colloquy between defense counsel and the court that defendant had previously been examined by a medical doctor, not a psychiatrist, and found to be fit to stand trial.

. . . .

The "hearing" in this case was in the context of a motion for a continuance to allow for a psychiatric examination prior to trial. Defense counsel did not request a full hearing on the matter nor did he tender evidence to support his motion. . . .

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[I]n this case it appears that the defendant presented all the evidence she was prepared to present. It should be noted that she did not request to be heard further on the matter. Under these circumstances we hold that the defendant's hearing satisfied the requirements of G.S. 15A-1002(b)(3).

State v. Williams, supra at 189, 247 S.E. 2d at 623.

In *State v. Potts*, 42 N.C. App. 357, 256 S.E. 2d 497 (1978), defendant's motion under G.S. 15A-1002 was made during jury selection. The court heard statements from defendant's attorney but no medical evidence was presented. The trial court denied the motion and this Court held that the hearing complied with G.S. 15A-1002(b)(3). *See also State v. Jacobs*, 51 N.C. App. 324, 276 S.E. 2d 482 (1981) (no hearing required on renewed motion where no additional evidence is presented).

The hearing requirement of G.S. 15A-1002(b)(3) appears to be satisfied as long as it appears from the record that the defendant, upon making the motion, is provided an opportunity to present any and all evidence he or she is prepared to present. Here, the record shows that defendant's motion was made during a recorded conference in chambers. The only evidence offered in support of the motion were statements by defendant's counsel that he and defendant had not had meaningful communication and defendant's own statements concerning his drug use and marital problems prior to his arrest. No medical evidence was offered or presented. In spite of his initial indication, counsel for defendant never made his motion in open court. There was no request to be heard further on the matter and no indication that defendant had more evidence to present.

Although the statute now requires a hearing, the decision to grant a motion for an evaluation of a defendant's capacity to stand trial remains within the trial judge's discretion. *State v. Woods, State v. Williams*, both *supra*. Defendant has the burden of persuasion with respect to establishing his incapacity. *State v. Jacobs, supra*. Although the better practice is for the trial court to make findings and conclusions when ruling on a motion under G.S. 15A-1002(b), it is not error for the trial court to fail to do so where the evidence would have compelled the ruling made. *Id.*; *State v. Womble*, 44 N.C. App. 503, 261 S.E. 2d 263, *rev. denied* and *appeal dismissed*, 299 N.C. 740, 267 S.E. 2d 669 (1980).

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Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion before reversal is required. *State v. McGuire*, 297 N.C. 69, 254 S.E. 2d 165, cert. denied sub nom *McGuire v. State*, 444 U.S. 943 (1979). The defendant here has shown no abuse of discretion. The transcript of the conference in chambers indicates that defendant was fully able to stand trial and to cooperate with his attorney and aid in his defense. The trial court's denial of defendant's motion was therefore not error and defendant's assignment of error is overruled.

II

[2] Defendant next argues that the trial court erred in failing to limit the State's cross-examination of him concerning his prior convictions. After defendant had admitted to previous convictions on drug-related charges, the district attorney inquired into the details of defendant's drug use: how the drugs were administered, how much defendant paid for them, and how he obtained them. Defendant argues that the State's inquiry exceeded permissible limits of cross-examination and that the information elicited was irrelevant and highly prejudicial.

This assignment of error encompasses twenty-five exceptions. These exceptions are supported in the record by two objections, both of which were overruled. It is well established that the failure to object to the introduction of evidence is a waiver of the right to do so. *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973); *Brandis*, N.C. Evidence § 27 (1982). A party may not properly make exceptions on appeal to evidence not objected to at trial. *State v. Gurley*, *supra*. In our discretion, however, we have reviewed the exceptions purportedly brought forward by defendant and find in them no basis for the granting of a new trial.

By taking the witness stand in his own defense, defendant was subject to impeachment like any other witness. Although defendant's character was not in issue, one of the means available to the State for impeaching defendant's credibility was by evidence of his bad character. *Brandis*, N.C. Evidence § 108 (1982). Where evidence of a witness's bad character included prior convictions for criminal offenses, the range of inquiry as to the details of the crime is limited. *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977), cited by defendant, states the policy and rule:

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Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from the issues properly before it, harass the witness and inject confusion into the trial of the case. Nevertheless, where a conviction has been established, a limited inquiry into the time and place of conviction and the punishment imposed is proper.

Id. at 141, 235 S.E. 2d at 824; *accord*, *State v. Bryant*, 56 N.C. App. 734, 289 S.E. 2d 630 (1982). *See generally*, Brandis, N.C. Evidence § 112.

In the present case, it is clear from the transcript that the State's cross-examination was not concerned with the details of the offenses of which defendant was previously convicted. Rather, the State's questions sought information concerning defendant's drug use subsequent to those prior convictions. The rule enunciated in *State v. Finch*, *supra*, does not apply here and defendant's reliance on it is misplaced. The State was subject only to the much broader limitations regarding impeachment by cross-examination generally.

Where a party seeks to impeach the character of a witness, he may inquire into any act of the witness that tends to impeach his character, provided the questions are asked in good faith, *State v. Mayhand*, 298 N.C. 418, 259 S.E. 2d 231 (1979). The trial judge has broad discretion with respect to the range and scope of cross-examination and his ruling should not be disturbed except where that discretion is abused or where the error is prejudicial. *Id.*; Brandis, N.C. Evidence § 42.

Here, the State sought to impeach defendant's credibility as a witness. It is clear that the State had a good faith basis for asking about defendant's drug use. No abuse of discretion by the trial court has been shown and no prejudice to defendant is apparent. It was not error for the court to allow the questions. Defendant's argument in this regard is without merit.

No error.

Judges ARNOLD and PHILLIPS concur.

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STATE OF NORTH CAROLINA v. RENA OLD CLARK

No. 831SC291

(Filed 6 December 1983)

1. Homicide § 21.9— voluntary manslaughter—sufficiency of evidence—use of excessive force

The evidence did not show as a matter of law that defendant acted in self-defense and was sufficient to support conviction of defendant for voluntary manslaughter on the basis of excessive force where the State presented evidence that defendant twice shot her unarmed husband and then called the sheriff's office and said she had done "a terrible thing," notwithstanding defendant presented evidence regarding the victim's violent actions toward her in the past and that she acted in self-defense on the occasion in question.

2. Criminal Law § 51— expert witness—formal tender not required

While the better practice is formal tender of a witness as an expert, such tender is not required, and it is not necessary for the judge to make a formal finding as to a witness's qualification as an expert absent a request therefor.

3. Criminal Law § 51— objection to qualification of expert

In order to challenge the qualifications of a witness as an expert, objection must be made in apt time on this special ground or else be waived, and a general objection is not sufficient for such purpose.

4. Criminal Law § 57— expert firearm testimony—foundation laid on cross-examination

A deputy sheriff was properly permitted to give opinion testimony as to the direction of the ejection of a shell casing from a weapon, although the State failed to show personal knowledge of the weapon or special expertise by the witness, where defendant laid a proper foundation for such testimony on cross-examination by eliciting evidence of the witness's prior experience with automatic weapons similar to the weapon in question.

5. Criminal Law § 144— refusal to modify sentence

The trial court did not abuse its discretion in refusing to modify a sentence imposed on defendant for voluntary manslaughter on the ground that the sentence imposed on defendant was not supported by evidence introduced at the trial and sentencing hearing. G.S. 15A-1414(b)(4).

6. Criminal Law § 131.2— newly discovered evidence—new trial not required

A defendant convicted of voluntary manslaughter in the shooting death of her husband was not entitled to a new trial on the ground of newly discovered evidence because of the discovery of a bullet tending to support defendant's testimony as to the location of defendant and her husband at the time of the shooting since (1) defendant had attempted to conceal the bullet and due diligence was thus not used to procure the testimony at trial; (2) the evidence was merely corroborative of defendant's testimony at trial; and (3) the evidence was not of such a nature that a different result would probably be reached at a new trial.

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APPEAL by defendant from *Allsbrook, Judge*. Judgment entered 15 October 1982 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 15 November 1983.

Defendant was charged in a proper bill of indictment with second degree murder. She was found guilty of voluntary manslaughter and from a judgment imposing a prison sentence of three years, she appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Twiford and Derrick, by Russell E. Twiford, Jack H. Derrick and Gary M. Underhill, Jr., for the defendant, appellant.

HEDRICK, Judge.

[1] Defendant assigns error to the denial of her motions to dismiss the charges, arguing "there was insufficient evidence to sustain a conviction on these charges." More specifically, defendant contends that the uncontradicted evidence demonstrated that she acted in self-defense, and that she did not use excessive force.

"[V]oluntary manslaughter occurs when one kills intentionally but does so in the heat of passion suddenly aroused by adequate provocation or in the exercise of self-defense where excessive force under the circumstances is employed or where the defendant is the aggressor bringing on the affray." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978). *See also State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980). Ordinarily, the credibility and sufficiency of defendant's evidence to establish a plea of self-defense are for the jury to evaluate under proper instructions. *State v. Smith*, 268 N.C. 659, 151 S.E. 2d 596 (1966), *cert. denied* 386 U.S. 1032, 18 L.Ed. 2d 593, 87 S.Ct. 1481 (1967). Where all the evidence tends to show the intentional killing of another with a deadly weapon, dismissal is appropriate only when "the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant. . . ." *State v. Johnson*, 261 N.C. 727, 730, 136 S.E. 2d 84, 86 (1964).

In the instant case the State presented evidence that tended to show the deceased died from gunshot wounds to the arm and chest. The State's evidence further showed that defendant called the Sheriff and said: "Sheriff, this is Rena Clark. Can you come

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out here at once? I have just done a terrible thing. I have shot Clarence." Defendant presented evidence that the deceased was a violent person who had threatened, beaten and held a gun or other dangerous weapon on her on numerous occasions. She testified that they had argued on the morning in question and the decedent had held the pistol to her head and clicked it, and that he had thrown her down on the floor and hit her with a wash cloth. She further testified that he put the pistol on the kitchen counter and started from the room, but then he turned back toward her, saying he meant to kill her. She stated that she grabbed the pistol and shot him, but he kept coming at her, so she shot him again. Defendant offered a substantial amount of evidence to corroborate her testimony regarding decedent's violent nature and his actions toward her in the past.

Excessive force has been characterized by our Supreme Court as that force used by "[a] defendant who honestly believes that he must use deadly force to repel an attack but whose belief is found by the jury to be unreasonable under the surrounding facts and circumstances. . . ." *State v. Jones*, 299 N.C. 103, 112, 261 S.E. 2d 1, 8 (1980). In the instant case the evidence discloses that defendant twice shot her husband, who was unarmed. We cannot say, as a matter of law, that this evidence discloses that the defendant did not use excessive force in defending herself. We believe the question was properly for the jury, and hold that the court did not err in denying defendant's motion to dismiss.

Defendant next contends that the court erred by "allowing into evidence testimony as to the ejection of a shell casing from a weapon on the ground that the testimony called for speculation from a witness who had never fired the weapon in question and who was not qualified as an expert." The following testimony by a deputy sheriff is the basis of this assignment of error:

Q. In which direction does it eject?

MR. TWIFORD: Objection.

COURT: If you know. You can only answer if you know.

A. It would be in a backwards motion.

Q. All right, backwards. Does it go to the right or to the left, do you know?

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MR. TWIFORD: Objection.

COURT: Well, again, only if you know.

A. It would vary.

Q. Depending on what?

MR. TWIFORD: Objection.

COURT: Overruled.

Q. Depending on what?

A. It would go to the shoulder or a little further to the right of the person that's pulling the trigger.

MR. TWIFORD: Motion to strike.

COURT: Denied.

On cross-examination of this witness, further testimony on this point was elicited:

Q. Now, Sheriff, have you yourself ever fired that particular pistol to see how the shell ejects?

A. No, sir.

Q. No?

A. No, sir.

Q. And so when you made a statement about how the shell would be ejected from that gun, it's based on having fired other guns but not that particular one?

A. Other automatics similar to this one.

Q. And did you know how high the projector [sic] is of a gun of this nature when it's fired out of the—when the shell is ejected?

A. No, sir. You can't really say because some shells has got more powder than others.

Q. Some shells will go in different directions?

A. Yes, sir. Some will go high and some eject lower.

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Q. Some eject lower. And if the shell would eject high and hit the ceiling in that kitchenette, it would ricochet or bounce off in another direction, wouldn't it?

MR. WILLIAMS: Objection; speculation.

COURT: If you have an opinion you may testify.

A. Yes, sir, it would.

Q. It would?

A. (Witness nods head.)

Defendant earnestly contends that the admission of the testimony objected to was prejudicial error, arguing that the officer was not qualified as an expert and that his testimony was not proper lay opinion because it was not based on personal knowledge.

[2, 3] Our courts have repeatedly characterized the expert witness as "one better qualified than the jury to draw appropriate inferences from the facts." *See, e.g., Cogdill v. Highway Comm.*, 279 N.C. 313, 321, 182 S.E. 2d 373, 378 (1971). In discussing the matter of when a witness should be considered "better qualified," one learned commentator has said, "the rule should be that the opinion of an experienced and well qualified witness (whether or not labeled an expert) is *always* admissible unless it is virtually certain (a very rare case) that the entire jury is equally qualified." 1 Brandis on North Carolina Evidence Sec. 132 at 514 n. 98 (2d Rev. Ed. 1982) (emphasis original). While the better practice is formal tender of a witness as an expert, our courts do not require such tender, nor is it necessary for the judge to make a formal finding, absent request by appellant, as to a witness' qualification as an expert. *State v. Mitchell*, 283 N.C. 462, 196 S.E. 2d 736 (1973). Such a finding has been held to be implicit in the court's admission of the testimony in question. *Id.* *See also State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969). In order to challenge the qualifications of a witness as an expert, objection must be made "in apt time on this special ground" or else be waived. *State v. Edwards*, 49 N.C. App. 547, 557, 272 S.E. 2d 384, 391 (1980) (citations omitted). A general objection is not sufficient for these purposes. *Id.*

[4] The record in the instant case reveals that the State failed to lay a proper foundation for the opinion testimony of this witness;

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neither personal knowledge of the weapon in question nor special expertise was established on direct examination. The defendant made only a general objection to the questions put by the State, however. She did not request that inquiry be made into the qualifications of the witness, nor did she ask that the State be directed to lay a proper foundation for its questions. Under these circumstances, we do not believe the court erred in ruling that the witness could answer "if he knows." Although defendant established on cross-examination that the witness had no personal knowledge of the weapon in question, we note that defendant did not at that point move to strike the earlier answers given by the witness. Defendant instead proceeded to establish an alternative basis for the witness' opinion—prior experience with automatics similar to the weapon inquired about. Having laid this foundation, defendant proceeded to elicit opinion testimony favorable to the defendant from the witness, over specific objection by the State. We do not believe the court erred in permitting this witness to give opinion testimony based on his experience with similar weapons. Further, we believe defendant waived any objection by his failure to identify specific grounds for exclusion of the proffered testimony. Finally, we believe any error that may have been committed was harmless beyond a reasonable doubt.

Defendant next assigns as error the court's denial of her three motions for appropriate relief. Defendant's first motion for appropriate relief was filed at the close of the trial on 15 October 1982. Defendant based this motion on errors allegedly made by the court in ruling on evidentiary matters and on the court's denial of defendant's motion to dismiss. These alleged errors form the basis for almost all of the other assignments of error brought forward and argued in the appeal and considered elsewhere in this opinion and need no further review or discussion.

[5] Defendant's second motion for appropriate relief, dated 19 October 1982, asked the court to "modify the judgment . . . whereby the defendant was given an active prison sentence . . . and to receive further evidence for consideration by the Court for a probationary sentence." The record reveals that defendant was convicted of voluntary manslaughter, an offense carrying a presumptive sentence of six years. The trial judge found five mitigating factors, no aggravating factors, and sentenced defendant to serve three years in prison. N.C. Gen. Stat. Sec. 15A-1414

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(b)(4), the provision under which defendant seeks modification of the judgment, identifies as one of the grounds for a motion for appropriate relief "[t]he sentence imposed on the defendant is not supported by evidence introduced at the trial and sentencing hearing." By order dated 8 February 1983 Judge Allsbrook found and concluded that this provision is "not applicable in this case and that the Court now does not have the authority to modify the sentence imposed in this case on October 15, 1982." Disposition of post-trial motions is within the discretion of the trial court, and denial of such motions is not error absent some abuse of discretion. *State v. Watkins*, 45 N.C. App. 661, 263 S.E. 2d 846 (1980). We find nothing in the record indicating that the court in this case abused its discretion in refusing to modify the judgment. While the court's statement that it lacked "authority" to modify the judgment, considered alone, is perhaps imprecise, it is clear that this lack of "authority" stemmed from the court's determination that no grounds for modification had been demonstrated. We find no error in the court's ruling on this point.

[6] Defendant's third motion for appropriate relief, filed on 19 October 1982, requested that the judgment be vacated and a new trial ordered based on the existence of newly discovered evidence. This motion was accompanied by affidavits of Russell E. Twiford, defendant's attorney, and Charles L. Hewitt, III, defendant's son. The affidavits in substance show that on 16 October 1982 the defendant's children informed Mr. Twiford that they had learned of new facts about their mother's case. Hewitt had been informed by his mother that there was a hole in the wall of the family room. She had learned of the hole about six days after the shooting, but had told no one about its existence. Only after her conviction did she reveal her knowledge. An examination of the hole revealed a bullet that had been fired from the death weapon. The location of the bullet tended to support defendant's testimony regarding the location of the defendant and her husband when the shooting occurred.

N.C. Gen. Stat. Sec. 15A-1415(b)(6) provides the following ground for a motion for appropriate relief:

Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that

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time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

This Court has devised a seven part test which must be met in order for a new trial to be granted on the grounds of newly discovered evidence. *See, State v. Martin*, 40 N.C. App. 408, 252 S.E. 2d 859 (1979). Defendant has failed to satisfy three parts of the test. First, the evidence does not indicate that "due diligence was used and proper means were employed to procure the testimony at trial." *Id.* at 411, 252 S.E. 2d at 861. It is admitted that defendant knew about the bullet hole in the wall some six days following the incident, that she told no one of the hole, and that she actually attempted to conceal it. Second, the evidence fails to establish that "the newly discovered evidence is not merely cumulative or corroborative." *Id.* While the position of the bullet hole strengthens defendant's testimony about her location during the altercation, this evidence is merely corroborative of her testimony. Finally, we do not believe that "the evidence is of such a nature that a different result will probably be reached at a new trial." *Id.* The jury obviously believed defendant's testimony, since it found her guilty only of voluntary manslaughter. It is clear from this verdict that the jury found either that the defendant acted in the heat of passion, or that she employed excessive force in the exercise of self-defense. Because the newly discovered evidence does not bear on either of these elements, the outcome of a new trial would probably be the same. The court did not abuse its discretion in denying the third motion for appropriate relief. The assignment of error is overruled.

Defendant's Assignment of Error Nos. 1, 2, 3, 5, 6, and 8-10 relate to the admission or exclusion of testimony. Assignment of Error No. 11 relates to the court's jury instructions. We have carefully examined all the exceptions on which these assignments of error are based and find them to be without merit. No useful purpose would be served by further elaboration thereon.

We hold that defendant had a fair trial free from prejudicial error.

No error.

Judges WHICHARD and BECTON concur.

State v. Simmons and State v. Hallman

STATE OF NORTH CAROLINA v. STEPHEN DOUGLAS SIMMONS

STATE OF NORTH CAROLINA v. HAL STACEY HALLMAN

No. 8325SC60

(Filed 6 December 1983)

1. Criminal Law § 92.5— motion for severance improperly denied

In prosecutions for trafficking in a controlled substance, the trial judge erred in denying defendant Hallman's motion for severance where defendant Simmons asserted an entrapment defense in which he testified that he was pressured into committing the offense by a police informant, where defendant Hallman did not testify because of a perceived weak case against him, and where in fact, the case in chief against Hallman, was not only circumstantial, but it was also sparse. G.S. 15A-927(c)(2).

2. Constitutional Law § 48; Criminal Law § 23— failure to inform client of plea bargain offer—ineffective assistance of counsel

A failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances. Where, because of his attorney's misunderstanding concerning a plea bargain offer, defendant was denied the opportunity to accept a plea offer, which, according to his affidavit, he would have accepted, defendant was clearly prejudiced by his attorney's failure to inform him of the offer and the case should be remanded for a new trial.

APPEAL by defendants from *Clifton E. Johnson, Judge*. Judgments entered 24 June 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 28 September 1983.

Defendants were indicted and convicted in a joint trial of trafficking in a controlled substance, to wit: marijuana. They were each sentenced to five years in prison.

Attorney General Rufus Edmisten, by Associate Attorney Floyd M. Lewis, for the State.

Rodney S. Toth, for defendant Stephen Douglas Simmons.

Beverly T. Beal, P.A., by Beverly T. Beal, for defendant Hal Stacey Hallman.

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BECTON, Judge.

I

The dispositive issues on appeal relate to the joinder of defendants' cases for trial and to effective assistance of counsel. Both defendants have appealed, but because we are granting defendant Simmons's motion for appropriate relief, we need not consider the merits of his appeal.

II

The State presented evidence tending to show that on 7 January 1982, around 7:00 P.M., Raymond Buff arrived at the residence of Clyde Coulter, and noticed a Volkswagen Beetle parked adjacent to the house. Shortly afterward, defendant Hal Hallman arrived at the residence, talked with Coulter for a while, and left. Approximately fifteen minutes after Hallman's departure, Buff and Coulter left. Buff drove the Volkswagen Beetle and Coulter drove a green station wagon which Buff had not seen upon his arrival. Buff and Coulter drove to an abandoned white house where Coulter left the station wagon. Coulter then drove the Volkswagen Beetle to a post office where he and Buff met Hallman and Charles Lay, who were in a Volkswagen Rabbit. Hallman and Coulter conversed, after which Coulter and Buff returned to the abandoned white house where they were subsequently joined by Hallman and Lay. Again Hallman and Coulter conversed. Shortly afterward, Hallman drove the green station wagon out of the driveway and was followed by the Volkswagen Rabbit and the Volkswagen Beetle to a Hickory parking lot where Hallman, Lay, and Coulter all got out and talked. Hallman returned from making a telephone call and talked again with Coulter and Lay, after which they all returned to their cars and left in the same procession until the lead green station wagon pulled over onto the shoulder of the road at a bridge. Hallman got into the Rabbit and the two vehicles proceeded to a convenience store where there was a parked yellow Capri containing defendant Stephen Simmons.

In the car with Simmons was S.B.I. Agent W. M. Campbell. Campbell testified that as he and Simmons were discussing the proposed purchase of 63 pounds of marijuana from Simmons, a bronze Volkswagen Rabbit and blue Volkswagen Beetle arrived in

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the parking lot of the convenience store. Campbell nervously asked Simmons who those people were, and Simmons assured him that "everything was all right," that those people "were just friends." After talking with Hallman, who was a passenger in the Rabbit, Simmons returned and told Campbell that the vehicle carrying the marijuana ran out of gas at a bridge, and that the transaction could not be completed at the agreed upon wildlife access area. After Campbell balked at "doing the deal" at the abandoned vehicle, Simmons agreed to pick up the marijuana from the station wagon and deliver it to the access area.

Raymond Buff testified that he observed Simmons remove some garbage bags from the station wagon, and that he and Coulter followed Simmons to the wildlife access area. When Simmons opened the rear of the car, exposing the large garbage bags, law enforcement officers raided the vehicle.

Simmons, Buff, and Coulter were arrested at the scene. Hallman and Lay were arrested at the convenience store. The large garbage bags contained 63 one-pound bags of a green vegetable matter, subsequently analyzed to be marijuana.

Defendant Hallman did not testify and presented no evidence, except to show, through cross-examination, that he was not at the access area, that no marijuana was found on his person, and that his fingerprints were not found on the bags. Defendant Simmons presented evidence that an informant, against whom the State had agreed to drop charges, pressured him into committing the offense.

III

Defendant Hallman's Appeal

[1] Defendant Hallman contends that the trial court erred in denying his motion for severance of his trial from that of Simmons. For the following reasons, we agree and grant Hallman a new trial.

A trial judge's ruling on a motion for severance is discretionary and will not be disturbed on appeal unless there is a showing that a defendant has been denied a fair trial by joinder. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). Each case turns on its own facts, however, and an abuse of discretion may

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be shown when the defenses of the co-defendants are antagonistic, and "the conflict in the defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, a defendant was denied a fair trial." *State v. Nelson*, 298 N.C. 573, 587, 260 S.E. 2d 629, 640 (1979); N.C. Gen. Stat. § 15A-927(c)(2) (1978).

Defendant Simmons asserted an entrapment defense in which he testified that he was pressured into committing the offense by a police informant. On the other hand, Hallman did not testify because of a perceived weak case against him.

The State's evidence, in its case in chief against Hallman, was not only circumstantial, but it was also sparse. Other than Buff's and S.B.I. Agent Campbell's testimony that, on a couple of different occasions, they saw, but did not hear, Hallman talk with Coulter or Simmons, and Buff's further testimony that Hallman was one of two people he saw driving the green station wagon on the night in question, no direct references to Hallman were made in the State's case. Of course, S.B.I. Agent Campbell was allowed to testify over Hallman's objection that Simmons told him (Campbell) that "the vehicle that had the marijuana in it had run out of gas and was located at the bridge." It is also true that Hallman, according to Buff, was the person driving the green station wagon when it ran out of gas on a bridge. But it was dark at all relevant times the green station wagon was being driven; neither Buff nor Campbell ever looked inside the green station wagon; and the green station wagon was left unobserved for a period of time. Further, the facts and declarations of Coulter and Simmons provided the State with no additional ammunition against Hallman since the parties were not charged with conspiracy.

The State's strongest case against Hallman was presented when co-defendant Simmons testified. Simmons first sought to show that he was entrapped by a police informant, Bruce Garavagila, who, incidentally, owned the green station wagon. Simmons later testified that he had talked with Hallman at the convenience store about the plan—the dope deal. Hallman told him that the station wagon had run out of gas and that Simmons had to go get it. Hallman had also advised him that Coulter and Buff would be there. As a result of his conversation with Hallman, Simmons drove to the abandoned station wagon and re-

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trieved the garbage bags. (Note—Agent Campbell had already testified that Simmons told him, after talking with Hallman, that the station wagon carrying the marijuana had run out of gas.)

Had the trials not been joined, the jury may not have heard the foregoing testimony against defendant Hallman. In a separate trial, Simmons could not have been compelled to testify against Hallman, and Campbell's testimony would have been inadmissible. The evidence at trial against Hallman was circumstantial. There was no evidence that marijuana was in the station wagon when he drove it, and the evidence showed that the station wagon was abandoned, and left unobserved, for a period of time. Hallman was not at the access area when the raid occurred and the marijuana was seized from Simmons's Capri. No marijuana was found on Hallman's person and his fingerprints were not on the bags.

For the foregoing reasons, we conclude that Hallman was denied a fair trial by the joinder. Because we are ordering a new trial, we need not consider Hallman's remaining assignments of error as they are not likely to recur at a new trial.

IV

Defendant Simmons's Motion for Appropriate Relief

[2] Defendant Simmons contends that he was denied effective assistance of counsel because his attorney did not advise him of a plea bargain offer.

According to affidavits filed by the assistant district attorney prosecuting this case and by counsel representing three co-defendants, they were all present, along with counsel representing defendant Simmons, at a pre-trial conference in Judge Johnson's chambers at which defendants Hallman and Simmons were offered the opportunity to plead guilty to felonious possession of marijuana. No defendants were present at this conference. According to the affidavit filed by counsel for defendant Simmons, when counsel questioned why defendant Hallman was being offered a plea to felonious possession and not his client, the district attorney replied, "If I gave it to Bev's client (Hallman), I would give it to you." Simmons's counsel interpreted this statement to mean that the offer to his client was conditioned upon Hallman's accepting the offer. Since Hallman did not accept, he did not communicate any offer to his client. The affidavits filed by the other

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parties present, however, indicate that the offer was not conditional. There is nothing in the affidavits to indicate that Judge Johnson would not have accepted the plea.

After the trial began, however, Simmons's counsel discovered that that offer was not conditioned upon Hallman's accepting it, and, being confident his client would accept the offer, he asked the assistant district attorney to allow his client to plead guilty to felonious possession, but the assistant district attorney refused because the trial had started.

Simmons swore in his affidavit that he would have taken the offer had he known of it. He had inquired about the possibility of a plea bargain but his attorney told him that the district attorney was not plea bargaining. Before trial he became upset when he discovered co-defendants Coulter and Lay had been offered, and had accepted, plea bargains, while he had not.

Plea bargaining has been recognized as "an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260, 30 L.Ed. 2d 427, 432, 92 S.Ct. 495, 498 (1971). In North Carolina, plea bargaining is expressly permitted, and the trial judge is allowed to participate. N.C. Gen. Stat. § 15A-1021 (Supp. 1981).

A defense attorney in a criminal case has a duty to advise his client fully on whether a particular plea to a charge is desirable, but the ultimate decision on what plea to enter remains exclusively with the client. N. C. Code of Professional Responsibility EC 7-7 (1981). "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." *Id.* EC 7-8. One such relevant consideration is the availability of a plea bargain—in order for a defendant to make a fully informed decision on what plea to enter, he must be made aware of any possible plea bargain. A lawyer thus is ethically bound to advise his client of a plea bargain offer.

Other jurisdictions hold that an attorney's failure to advise his client of a plea bargain offer amounts to ineffective assistance of counsel unless counsel effectively proves that he did inform his client of the offer or provides an adequate explanation for not advising his client of the offer. Annot., 8 A.L.R. 4th 660 (1981).

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One such case holding that an attorney's failure to inform his client of a plea bargain offer constituted ineffective assistance of counsel is *Lyles v. State*, 178 Ind. App. 398, 382 N.E. 2d 991 (1978), in which the attorney ostensibly left the plea negotiations in the judge's chambers to inform his client of a plea bargain offer but never actually informed his client of the offer. The Indiana court derived counsel's minimal duty from the A.B.A.'s *Standards Relating to the Defense Function* § 6.2(a) (App. Draft 1971). The pertinent standard remains unchanged in its current edition:

In conducting discussions with the prosecutor the lawyer should keep the accused advised of developments at all times and *all proposals made by the prosecutor should be communicated promptly to the accused.* (Emphasis added.)

1 *Standards for Criminal Justice* Standard 4-6.2(a) (2d ed. 1980). The commentary to Standard 4-6.2 states:

Because plea discussions are usually held without the accused being present, *there is a duty on the lawyer to communicate fully to his client the substance of the discussions.* It is important that the accused be informed of proposals made by the prosecutor; *the accused, not the lawyer, has the right to pass on prosecution proposals*, even when a proposal is one which the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, he must act with full awareness of his alternatives, including any that arise from proposals made by the prosecutor. (Emphasis added.) *Id.*

Id. Our Supreme Court recently adopted the *McMann* standard for gauging effective assistance of counsel. *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982). The *McMann* standard tests "whether counsel's performance was 'within the range of competence demanded of attorneys in criminal cases'." *Id.* at 641, 295 S.E. 2d at 382 (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 25 L.Ed. 2d 763, 773, 90 S.Ct. 1441, 1449 (1970)). As apparent from the foregoing discussion, a criminal defense attorney should advise his clients of plea bargain offers. We, therefore, hold that a failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances.

In the present case, defendant Simmons's counsel appeared to be sincere in his belief that the offer was conditional. Once

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counsel discovered the true facts, he attempted to revive the offer but the district attorney refused. Because of his attorney's misunderstanding, Simmons was denied the opportunity to accept the plea offer, which, according to his affidavit, he would have accepted. Simmons was clearly prejudiced by his attorney's failure to inform him of the offer.

Felonious possession of marijuana, to which Simmons was offered a chance to plead, is a Class I felony, which carries a presumptive term of two years. N.C. Gen. Stat. § 90-95(d)(4) (Supp. 1983); N.C. Gen. Stat. § 15A-1340.4(f)(7) (Supp. 1981). According to defendant's affidavit, his only prior conviction was for misdemeanor possession of marijuana. In contrast, trafficking in excess of 50 pounds, but less than 100 pounds of marijuana carries a mandatory minimum sentence of five years, with no eligibility for early release, parole or probation. N.C. Gen. Stat. § 90-95(h)(1)(a) (Supp. 1983); N.C. Gen. Stat. § 90-95(h)(5) (Supp. 1983). Of those indicted, only the two who were tried, Hallman and Simmons, received five-year sentences. Charges were dropped against Buff. Lay was allowed to plead no contest to misdemeanor possession. Coulter was allowed to plead guilty to felonious possession of marijuana, for which he received a split sentence, six months active and eighteen months probation.

We do not believe that defendant should be unjustly penalized for his attorney's misinterpretation, however sincere. Consequently, we are vacating the judgment and conviction and remanding the case for a new trial.

Because of our disposition in this case, we need not consider defendant Simmons's remaining arguments in his motion or the merits of his appeal.

V

The results are:

New trials for defendants Hallman and Simmons.

Judges WHICHARD and BRASWELL concur.

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STATE OF NORTH CAROLINA v. JOHNNY B. GOFORTH, HOWARD B. ROSOKOFF AND VIRGINIA LEE REYNOLDS

No. 8328SC121

(Filed 6 December 1983)

1. Narcotics § 2— indictment for trafficking in marijuana

An indictment charging that defendant conspired to traffic "in at least 50 pounds of marijuana" was invalid because it failed to charge that defendant conspired to traffic "in excess of 50 pounds." G.S. 90-95(h)(1); G.S. 90-95(i).

2. Searches and Seizures § 25— insufficient affidavit for search warrant

An officer's affidavit was insufficient to support issuance of a warrant to search a residence for drugs where the affidavit contained no facts closely related to the time of its issuance that justified a finding of probable cause at that time, and where there was no information in the affidavit to support a finding of probable cause that drugs were being stored or that drug-related activities were taking place at the residence.

APPEAL by defendants from *Owens, Judge*. Judgments entered 16 August 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 18 October 1983.

On 10 September 1981, Special Agent David C. Ramsey of the State Bureau of Investigation applied for a warrant to search for marijuana at 335-A Temple Road, Black Mountain, North Carolina. The attached affidavit recited the following facts to establish probable cause for the issuance of the search warrant:

On Monday, June 22, 1981 until present Affiant has interviewed various sources concerning an alleged illicit drug smuggling operation. . . . As a result of this investigation the Affiant has obtained information from the above named sources which indicates that Depoo, Goforth, Reynolds, Howie, Harris, and Roach are smuggling marijuana and other drugs from Florida to North Carolina by automobile. Further, that since the smuggling operation has been in effect the suspects have been utilizing two residences in Buncombe County for the storage of drugs and the furtherance of their illicit drug operation. Note: Thesé residences are is named in the places to be searched. (DCR)

. . .

On April 16, 1977 Goforth . . . was arrested in Falfurries, Texas for possession of approximately 270 pounds of mari-

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juana. Goforth subsequently pleaded guilty . . . to possession of marijuana. . . .

Affiant has not been able to locate any arrest information on Reynolds.

On Thursday, September 10, 1981 Affiant . . . obtained information from the Drug Enforcement Administration that Roskoff [sic] is known to be a heroin and cocaine seller, and in 1975 Roskoff [sic] was indicted by a Florida Grand Jury for a drug violation. Further, that Roskoff [sic] was alledged [sic] to be involved in vessels which were suppose [sic] to be involved in drug smuggling.

Since this investigation was initiated Affiant has conducted surveillance on several occassions [sic] at the Executive Club, Hwy. 70, Swannanoa, N.C., a residence located at 335-A Temple Road, Black Mountain, N.C., and a residence located off Bee Tree Lake Road in Buncombe County. During this period of time Affiant has personally observed meetings take place between Harris and Goforth, Roskoff [sic] and Goforth, Goforth and Reynolds, and further that on Thursday, September 10, 1981 Affiant observed Danny Roach and "Slim" Jordan at the residence located at 335-A Temple Road, Black Mountain, North Carolina. Subsequently on 9/10/81 this affiant interviewed a confidential source previously mentioned in this affidavit as reliable. The source stated that on this date subjects Danny Roach and Jordan Robinson were traveling from Rutherford Co. to Black Mtn. to purchase marihuana. [sic] As a result Agents conducting surveillance observed the above subject (Roach and Robinson) at the residence described in this warrant operating a Ford, bearing N.C. plates. Agents observed the vehicle depart the residence and proceed east on Hwy. 70. The subjects observed Agents conducting surveillance and turned around and went back to the residence (after stopping at the ABC store). Shortly Robinson and Roach departed again operating the same vehicle and were stopped by Agents. A search of the vehicle proved neg. with the exception of a [sic] odor of marihuana [sic] present in the trunk of the vehicle. . . .

Also Robinson had approx. five to six thousand dollars in US currency on the person and the name and address of Paul

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Depoo. As a result of the information in this affidavit this affiant request that this warrant be issued and all papers, documents, and monies be seized and held subject to court order as evidence as a conspiracy to traffic in marihuana [sic].

Attached was a description of the premises at 335-A Temple Road.

Based on the affidavit and application, a search warrant for 335-A Temple Road was issued on 10 September 1981. The search warrant was executed on that same day. Two burlap bags containing a quantity of suspected marijuana were found during the search, and defendants were arrested. On 1 December 1981, a true bill of indictment was returned against each defendant for trafficking in marijuana on 10 September 1982 "by possessing more than 50 pounds but less than 100 pounds of marijuana."

Defendants filed motions to suppress and a motion *in limine* to suppress all items seized under the search warrant. A hearing on these motions was held on 20 April 1982. After that hearing, the trial judge entered an order, dated 10 May 1982, denying the motions to suppress and motion *in limine* of defendant Rosokoff.

On 11 May 1982, each defendant was indicted for conspiring "to commit the felony of trafficking in at least 50 pounds of marijuana G.S. 90-95(h), a controlled substance which is included in Schedule VI of the North Carolina Controlled Substance Act. This act was in violation on [sic] the following law: 90-95(h)(i)."

On 10 August 1982, defendants came to trial on the conspiracy charges. At that time, defendant Goforth called to the attention of the court the lack of a ruling on his motions to suppress and motion *in limine*. The trial court then considered the evidence and denied defendant Goforth's motions.

Defendants were tried on the conspiracy charges. The jury returned a guilty verdict, and defendants' motions for appropriate relief were denied. Defendants each received prison sentences of eight years. Defendants Goforth and Reynolds were fined \$5,000 each, and defendant Rosokoff was fined \$7,500.

From these judgments, defendants appeal.

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Attorney General Edmisten by Associate Attorney John R. Corne, for the State.

Herbert L. Hyde and Max O. Cogburn, Sr., for defendant-appellants Johnny B. Goforth and Howard B. Rosokoff.

Robert L. Harrell, Assistant Public Defender, for defendant-appellant Virginia Lee Reynolds.

EAGLES, Judge.

I.

[1] Defendants assign as error the trial court's denial of their motion for appropriate relief, after the return of the jury verdict, on the grounds that the conspiracy indictments do not charge any violation of the law. For a valid indictment, there must be such certainty in the statement of accusation as will (1) identify the offense with which the accused is sought to be charged; (2) protect the accused from being twice put in jeopardy for the same offense; (3) enable the accused to prepare for trial; and (4) enable the court, on conviction or plea of nolo contendere or guilty, to pronounce sentence. *State v. Sparrow*, 276 N.C. 499, 510, 173 S.E. 2d 897, 904 (1970), *cert. denied*, 403 U.S. 940, 91 S.Ct. 2258, 29 L.Ed. 2d 719 (1971). We find that there was uncertainty as to the offense charged sufficient to render the indictments here invalid and hold that defendants' motion for appropriate relief should have been granted.

The indictments recited that defendants "did feloniously conspire . . . to commit the felony of trafficking in at least 50 pounds of Marijuana G.S. 90-95(h). . . . This act was in violation on [sic] the following law: 90-95(h)(i)." Because the offense charged was a conspiracy, the citation to G.S. 90-95(h)(i) should properly read "90-95(i)." G.S. 90-95(i) establishes the penalty for conspiracy to traffic in marijuana as the same as for trafficking in marijuana as provided in G.S. 90-95(h). Trafficking in marijuana consists of either selling, manufacturing, delivering, transporting, or possessing "in excess of 50 pounds (avoirdupois) of marijuana." G.S. 90-95(h)(1). Thus, an indictment for violation of G.S. 90-95(i) must charge a defendant with conspiring to traffic, sell, manufacture, deliver, transport, or possess *in excess of* 50 pounds of marijuana. See, *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163, *cert. denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982).

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These indictments are invalid because they charge that defendants conspired to traffic "in at least 50 pounds of marijuana." An indictment must particularize the essential elements of the specified offense. *State v. Sturdivant*, 304 N.C. 293, 309, 283 S.E. 2d 719, 730 (1981). Weight of the marijuana is an essential element of trafficking in marijuana under G.S. 90-95(h). *State v. Anderson*, 57 N.C. App. at 608, 292 S.E. 2d at 167. Conspiracy to traffic in marijuana is not alleged by these indictments because "in at least 50 pounds" is not "in excess of 50 pounds." Because of the fatal error in failing to allege all the necessary elements of the offense, the indictments here were invalid.

Judgment must be arrested when the indictment fails to charge an essential element of the offense. *State v. McGaha*, 306 N.C. 699, 295 S.E. 2d 449 (1982); *State v. Cannady* and *State v. Hinnant*, 18 N.C. App. 213, 196 S.E. 2d 617 (1973). Therefore, defendants' motions for appropriate relief were improperly denied, and judgments in these cases must be arrested. See G.S. 15A-1411(c).

The legal effect of arresting judgment is to vacate the verdict and sentence. The State may proceed against the defendants if it so desires, upon new and sufficient bills of indictment. *State v. Benton*, 275 N.C. 378, 167 S.E. 2d 775 (1969); *State v. Cannady* and *State v. Hinnant*, *supra*.

II.

[2] Because the State may seek to re-indict and re-try defendants, we think it appropriate to discuss one other assignment of error. Defendants contend that the trial court erred in denying defendants' motion to suppress and motion *in limine* to suppress all evidence and items seized during the search. Defendants allege that the affidavit offered in support of the search warrant was fatally defective because (1) the information contained in it was stale and (2) it failed to implicate the premises to be searched. We agree. There were no facts in the affidavit closely related to the time of its issuance that justified a finding of probable cause at that time. Neither was there any information in the affidavit to support a finding of probable cause that drugs were being stored or that drug-related activities were taking place at 335-A Temple Road.

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Search warrants may only be issued upon a finding of probable cause for the search. U.S. Const. amend. IV; G.S. 15A-245. Proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. 68 Am. Jur. 2d Searches and Seizures § 70. Our court has recently held:

The general rule is that no more than a "reasonable" time may have elapsed. The test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932); *State v. King*, 44 N.C. App. 31, 259 S.E. 2d 919 (1979).

State v. Lindsey, 58 N.C. App. 564, 565, 293 S.E. 2d 833, 834, cert. denied, 306 N.C. 747, 295 S.E. 2d 761 (1982). Our court suggested that an interval of two or more months between the alleged criminal activity and the affidavit is generally an unreasonably long delay. *Id.* at 566, 293 S.E. 2d at 834.

The affidavit offered to justify a finding of probable cause consisted of a report on the comings and goings of certain individuals (including defendants) to and from 335-A Temple Road, and a recitation of defendants' prior drug-related arrests and their reputations. When SBI agents stopped and searched the individuals after they left 335-A Temple Road, they were not in possession of marijuana, and nothing else appearing, their activities as stated in the affidavit cannot justify a finding of probable cause. That leaves the recitation of defendants' prior drug-related activities to support the finding of probable cause. Defendant Goforth's arrest for possession of marijuana was in 1977; there was no arrest information on defendant Reynolds; and defendant Rosokoff's indictment for a drug violation in Florida was in 1975. Clearly, a recitation of the prior arrests of these defendants, even in combination with the alleged comings and goings to and from 335-A Temple Road, failed to provide timely information on which to base a finding of probable cause.

In addition, this affidavit failed to implicate the premises to be searched. In order to show probable cause, an affidavit must establish reasonable cause to believe that the proposed search for evidence of the designated offense will "reveal the presence upon the described premises of the objects sought and that they will

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aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 129, 191 S.E. 2d 752, 755 (1972). Probable cause cannot be shown by an affidavit which is purely conclusory and does not state underlying circumstances upon which the affiant's belief of probable cause is founded; there must be facts or circumstances in the affidavit which implicate the premises to be searched. *State v. Rook*, 304 N.C. 201, 221, 283 S.E. 2d 732, 744-745 (1981), *cert. denied*, 455 U.S. 1038, 102 S.Ct. 1741, 72 L.Ed. 2d 155 (1982).

In order for an affidavit to establish probable cause sufficient to justify issuance of a search warrant, a recital of underlying facts or circumstances is essential. *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965). The only statements in the affidavit that concerned 335-A Temple Road were: (1) the conclusory statement that 335-A Temple Road was being used "for the storage of drugs and the furtherance of their illicit drug operation," and (2) the fact that two individuals that a confidential informant said were going "to Black Mtn. to purchase marihuana" [sic] later appeared at 335-A Temple Road. We hold that these statements do not recite facts or circumstances sufficient to implicate the premises at 335-A Temple Road as a place where drugs were being stored or where drug-related activities were taking place. Thus, the search warrant was invalid, and the fruits of the search were not competent evidence. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961); *State v. Campbell*, *supra*; G.S. 15A-974.

The evidence obtained upon execution of the invalid search warrant is not admissible against these defendants.

Based on our holding in part I above, the judgments are arrested.

Judges HEDRICK and BECTON concur.

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JACK WESTON, SR., EMPLOYEE v. SEARS ROEBUCK & CO., SELF-INSURED

No. 8210IC1170

(Filed 6 December 1983)

Master and Servant § 85— workers' compensation— error to find jurisdiction— time limit expired

Pursuant to G.S. 97-24(a) the Industrial Commission erred in finding it had jurisdiction to hear plaintiff's workers' compensation claim where plaintiff alleged he sustained injuries in the course of his employment with defendant on 20 November 1970 but failed to file a claim for compensation with the Industrial Commission until 18 March 1981, and where the facts do not support the conclusion that defendant was equitably estopped from challenging the Industrial Commission's jurisdiction to hear plaintiff's claim.

APPEAL by defendant from the Opinion and Award of the North Carolina Industrial Commission filed 28 June 1982. Heard in the Court of Appeals 27 September 1983.

Plaintiff seeks workers' compensation benefits for injuries allegedly sustained in the course of his employment with defendant on 20 November 1970.

Plaintiff filed a claim for compensation with the Industrial Commission on 18 March 1981. Defendant filed a motion to dismiss the claim for lack of jurisdiction on the grounds that plaintiff had failed to file his claim within the time provided by law. By order of the full Commission, the initial hearing in the matter was restricted to the issue of jurisdiction. From the evidence and testimony taken at the initial hearing on 29 October 1981, the deputy commissioner made the following findings of fact:

1. Plaintiff was a TV repairman and an installer of television antennas for defendant employer in a territory which comprised several states around Hendersonville. He had begun employment with defendant employer about two years prior to his injury and he had a similar job in which he was self-employed on the side in which he did occasional work.

2. On November 20, 1970 plaintiff was on the top of a house which was located on the top of a mountain and the weather was particularly rough that day and plaintiff was required to work outside some 30 to 40 minutes. He found afterward that he could not work his fingers and has had

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pain in his hands and fingers and a tingling and burning sensation since that time and has had medical treatment for that condition.

3. The following day when plaintiff went into the store in the morning he told several co-employees as well as the manager of the store that he had hurt his hands the day before on the job. [He did not advise them that he was making a workers' compensation claim nor did he advise them at that time about medical treatment.]

4. Nor has plaintiff advised defendant employer at any time since then of the medical treatment he's had on his hands and fingers nor of his intention to pursue a workers' compensation claim.

5. Plaintiff's first written notice to defendant employer was the Form 18 which he filed with the Commission bearing the date of March 16, 1981 and having been filed with the Commission on March 18, 1981.

6. Plaintiff's employment with defendant employer was terminated on March 2, 1972 and at that time he knew that he was not going to receive any compensation from defendant employer for this alleged injury. If defendant employer had been estopped by its conduct prior to that time to assert any statute of limitations defense, such estoppel certainly ceased at that time since plaintiff was then on notice that he would not be paid any workers' compensation as a result of the injury.

From these facts, the deputy commissioner made the following conclusions of law:

1. On November 20, 1970 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer.

2. The statute of limitations time period has expired and plaintiff can no longer make his claim. G.S. 97-24. Defendant has not engaged in any conduct which would constitute estoppel to allow plaintiff to pursue his claim at this late date.

Plaintiff's claim for workers' compensation benefits was accordingly denied. Plaintiff applied to the full Commission for review.

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In addition to finding essentially the same facts as the deputy commissioner, the full Commission also found:

2. . . . The store manager advised plaintiff to "take it easy" in the use of his hands and not to "overdo anything." The store manager did not advise plaintiff to see a doctor or file any report of the injury. The plaintiff was put on "light duty," which meant no outside work with his hands, but he experienced pain and cramping in his hands that hampered his work repairing TV sets. Plaintiff continued to work for defendant-employer inside despite problems with his hands which grew progressively worse until on or about March 2, 1972, when he was fired for allegedly "fleecing the company out of time" in the TV repair business. At this point, plaintiff held up his bandaged hands, asked the supervisor who fired him what defendant-employer was "going to do about these," and was told by the supervisor that the company would "take care of it."

3. After his firing, plaintiff wrote defendant-employer on several occasions to inquire about whether he would be compensated in any way for the injury to his hands but never received a reply to his letters. Plaintiff also discussed the matter with one or more lawyers, none of whom had any authority to speak for defendant-employer. The misrepresentation of its intentions on the part of defendant-employer, coupled with its failure to actually reveal the fact that it had no intention of "taking care of" the plaintiff's injury until plaintiff filed his claim on March 18, 1981, constitute conduct on the part of defendant-employer which estop it from pleading the time limit in G.S. 97-24 as a bar to plaintiff's claim. Plaintiff relied on defendant-employer's false promise to his own detriment. Defendant-employer's conduct also constitutes a reasonable excuse for plaintiff's failure to file a written report of his injury with his employer as required by G.S. 97-22.

The Commission concluded on the basis of these facts that defendant was estopped to deny the Industrial Commission's jurisdiction to consider the late claim. The Commission also concluded that plaintiff had suffered a compensable injury and reset the hearing for a determination as to the amount of compensation due. From this order, defendant appealed.

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James H. Toms for plaintiff appellee.

Prince, Youngblood, Massagee and Creekman, by James E. Creekman for defendant appellant.

EAGLES, Judge.

We note at the outset that the only question properly before this Court is whether the Industrial Commission had jurisdiction to consider plaintiff's claim for workers' compensation. By order of the full Commission, the initial hearing was limited to defendant's motion to dismiss for lack of jurisdiction. Given the limited scope of the hearing, it was patently improper for the deputy commissioner to find and conclude that plaintiff had suffered an injury arising from his employment with defendant. It was similarly improper for the full Commission, on appeal from the Opinion and Award of the deputy commissioner, to find and conclude that plaintiff had a compensable injury, regardless of its ruling with respect to jurisdiction. To hold otherwise would deny both parties their rights under the law. We therefore express no opinion as to the substantive merits of plaintiff's claim but limit our opinion to the question of whether the Industrial Commission had jurisdiction to consider the claim.

General Statute 97-24(a) reads:

The right to compensation under this article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident.

It is well established in North Carolina law that timely filing of a claim for compensation is a condition precedent to the right to compensation. *Montgomery v. Horneytown Fire Dept.*, 265 N.C. 553, 144 S.E. 2d 586 (1965); *Barham v. Kayser-Roth Hosiery Co.*, 15 N.C. App. 519, 190 S.E. 2d 306 (1972). Under this construction, failure to file a claim in a timely fashion works a jurisdictional bar to the right to receive compensation. *McCrater v. Engineering Co.*, 248 N.C. 707, 104 S.E. 2d 858 (1958); *Barham v. Kayser-Roth Hosiery Co.*, *supra*; see also *Polythress v. J. P. Stevens*, 54 N.C. App. 376, 283 S.E. 2d 573 (1981), *rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982) (construing a similar provision regarding occupational diseases). The general rule is that a jurisdictional bar cannot be overcome by consent of the parties, waiver or estoppel.

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Hart v. Motors, 244 N.C. 84, 92 S.E. 2d 673 (1956); *Barham v. Kayser-Roth Hosiery Co.*, *supra*; *Clodfelter v. Furniture Co.*, 38 N.C. App. 45, 247 S.E. 2d 263 (1978).

Nevertheless, plaintiff argues that, based on the facts of this case, the defendant is equitably estopped from asserting lack of jurisdiction as grounds for dismissing the case. Plaintiff bases this argument on the theory that defendant's actions amounted to false representations or concealment of material facts with the object of misleading him in order to avoid his filing of a claim for workers' compensation. In so doing, plaintiff attempts to bring himself within the fact situation contemplated by *Polythress v. J. P. Stevens*, *Clodfelter v. Furniture Co.*, and *Barham v. Kayser-Roth Hosiery Co.*, all *supra*. Those cases suggest that the jurisdictional bar created by a failure to file a timely claim may be overcome on a theory of equitable estoppel where facts indicate intentional deception of the employee by the employer.

Hart v. Motors, *supra*, is cited in the briefs of both parties and in subsequent cases for its articulation of the general rule with regard to cases like the one before us. *See, e.g., Clodfelter v. Furniture Co., Barham v. Kayser-Roth Hosiery Co.*, both *supra*. In *Hart*, plaintiff employee was compensated for his injury by defendant employer under a consent decree approved by the Industrial Commission. Plaintiff moved to set aside the decree on jurisdictional grounds, asserting that he was not an employee of defendant at the time of the injury. In considering that motion, the Supreme Court said:

The North Carolina Industrial Commission has a special or limited jurisdiction created by statute, and confined to its terms. Viewed as a court, it is one of limited jurisdiction and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.

Hart v. Motors, *supra* at 88, 92 S.E. 2d at 676.

Hart presents a factual situation and procedural posture that distinguish it from the present case but the rule pronounced is just as applicable. On the facts presented in *Hart*, the court found

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no estoppel. In so doing, the court expressly left open the question of "whether under all circumstances a party to a proceeding of the Industrial Commission can, or cannot, be estopped to attack its jurisdiction over the subject matter. . . ." *Id.* at 89, 92 S.E. 2d at 677.

In this case, we find that the facts do not support the conclusion that defendant was equitably estopped from challenging the Industrial Commission's jurisdiction to hear plaintiff's claim. Plaintiff's reliance on defendant's promise to "take care of [his injury]" may have been reasonable in light of the circumstances *at the time*. However, the reasonableness of this reliance becomes suspect after nine years pass from the time when the promise was made with no indication that the promise will be honored. This alone would be enough to dissipate the effect of the alleged misrepresentation by defendant. In this respect, the findings made on review by the full Commission do not support the conclusions drawn.

Ordinarily, the findings of fact of the Industrial Commission are binding on appeal if supported by any competent evidence. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977); *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980). However, where a party challenges the jurisdiction of the Commission, the findings of fact are not conclusive and the reviewing court may consider all of the evidence in the record and make its own findings of fact. *Richards v. Nationwide Homes*, 263 N.C. 295, 139 S.E. 2d 645 (1965); *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Lucas v. Li'l Gen. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976). With this in mind, we note that the deputy commissioner and the full Commission found that plaintiff, after leaving his job with defendant, consulted an attorney regarding compensation for his injury. This finding was based on uncontradicted testimony elicited from plaintiff on cross-examination by defendant. Although not found as a fact by either the deputy commissioner or the full Commission, the same uncontradicted evidence also shows that plaintiff consulted an attorney as early as June of 1972, three months after leaving his job which was approximately five months prior to the deadline for filing his claim. With these strong indications of the verity of the testimony and its obvious relevance, it is not clear why it was disregarded. This evidence affirmatively demonstrates that plaintiff was no longer

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relying on whatever promises or representations had been made to him by defendant. The additional time, if any, to which plaintiff may have been entitled by virtue of his reliance on defendant's promise ran out long before he filed his claim for compensation, nearly ten and a half years from the date of his injury.

Finally, in its Opinion and Award, the Commission cites the cases of *Watkins v. Central Motor Lines*, 10 N.C. App. 486, 179 S.E. 2d 130, *rev'd on other grounds*, 279 N.C. 132, 181 S.E. 2d 588 (1971) and *Ammons v. Sneed's Sons*, 257 N.C. 785, 127 S.E. 2d 575 (1962), in support of its conclusions regarding jurisdiction. Both of these cases involve G.S. 97-47, dealing with time limits for filing claims based on a change of condition. The time limit in G.S. 97-47 has been construed to be a statute of limitations and not a condition precedent to jurisdiction. *Gragg v. Harris and Son*, 54 N.C. App. 607, 284 S.E. 2d 183 (1981). Clearly, there is no analogy to be drawn between G.S. 97-47 and G.S. 97-24, the statute involved here. The Commission's interpretation of *Watkins* and *Ammons* is incorrect and defendant's reliance on those cases is misplaced.

We conclude that the Industrial Commission had no jurisdiction to consider plaintiff's claim and defendant's motion to dismiss should have been granted. Accordingly, the Opinion and Award of the full Commission must be reversed with instructions to remand the cause to the deputy commissioner for entry of an order granting defendant's motion.

Reversed and remanded.

Judges ARNOLD and PHILLIPS concur.

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MARTIN MARIETTA CORPORATION v. FORSYTH COUNTY ZONING BOARD OF ADJUSTMENT, GEORGE D. BINKLEY, JR., ROBERT H. COLLEY, WALLACE L. SHELTON, H. B. GOODSON, JOHNNE ARMENTROUT AND AMOS E. SPEAS

No. 8221SC1076

(Filed 6 December 1983)

Courts § 2; Rules of Civil Procedure § 41.2— lack of personal jurisdiction—law of the case—no authority to grant 30 days to begin new action

Where the trial court's order that it lacked personal jurisdiction over respondents became the law of the case when petitioner withdrew its appeal therefrom, the court was without authority to enter any order granting any relief, and the court thus did not have authority to grant petitioner the relief of 30 days within which to commence a new action based on the same claim.

Judge PHILLIPS dissenting.

APPEAL by respondents from *DeRamus, Judge*. Order entered 13 August 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 August 1983.

Petitioner requested a special use permit to establish a quarry, and respondents denied the request. Petitioner then petitioned the superior court, pursuant to G.S. 160A-388(e), for certiorari and judicial review. Respondents, pursuant to G.S. 1A-1, Rule 12(b), moved to dismiss for lack of jurisdiction over the person on the alleged grounds that the petition had not been legally or properly served on them, and no summons had been issued, directed to, or served on any respondent. The trial court granted the motion, but provided pursuant to G.S. 1A-1, Rule 41(b) that the action was dismissed without prejudice and respondents were allowed thirty days within which to commence a new action based on the same claim.

Respondents gave notice of appeal from the "without prejudice" portion of the order. Petitioner gave notice of cross appeal from the order itself.

On 10 November 1982 this Court allowed petitioner's motion to withdraw its cross appeal. The matter is thus before us solely on respondents' appeal from that portion of the order providing that the dismissal was without prejudice to commencement of a new action.

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P. Eugene Price, Jr. and Jonathan V. Maxwell for respondent appellants.

No brief filed for petitioner appellee.

WHICHARD, Judge.

Because petitioner withdrew its cross appeal, the order, except for the portion from which respondents appeal, has become the law of the case. Whether it is correct or erroneous, the parties are bound by it. *Gower v. Insurance Co.*, 281 N.C. 577, 580, 189 S.E. 2d 165, 167 (1972); see also *Gaskins v. Insurance Co.*, 260 N.C. 122, 124, 131 S.E. 2d 872, 873 (1963).

The law of this case is, then, that the court lacks personal jurisdiction over the respondents. When a court lacks jurisdiction, it is "without authority to enter any order granting any relief." *Swenson v. Assurance Co.*, 33 N.C. App. 458, 465, 235 S.E. 2d 793, 797 (1977). "When a court has no authority to act, its acts are void." *Russell v. Manufacturing Co.*, 266 N.C. 531, 534, 146 S.E. 2d 459, 461 (1966). A court without jurisdiction is, for example, without authority to entertain a motion for summary judgment or to enter any judgment except a formal order of dismissal, *Sink v. Easter*, 284 N.C. 555, 561, 202 S.E. 2d 138, 143 (1974); and it does not have the power to enter a default judgment, *Russell v. Manufacturing Co.*, *supra*.

Because the court was "without authority to enter any order granting any relief," *Swenson*, *supra*, it did not have authority to grant petitioner the relief of thirty days within which to commence a new action based on the same claim; and its action in this respect is void. In our view the foregoing authorities establish the invalidity of dicta to the contrary in the Court of Appeals version of *Gower v. Insurance Co.*, 13 N.C. App. 368, 374-75, 185 S.E. 2d 722, 726-27 (1972), which dicta our Supreme Court expressly declined to approve or disapprove, see *Gower*, 281 N.C. at 581, 189 S.E. 2d at 168.

For the foregoing reasons, the portion of the order from which respondents appeal is

Vacated.

Chief Judge VAUGHN concurs.

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Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my judgment the situation presented requires us to declare not what the "law of the case" as between the parties will be in the unlikely event petitioner ever seeks to relitigate the matters involved in this appeal, but what the law of this state is with respect to getting zoning board decisions reviewed in the Superior Court. That such information is sorely needed by respondents, the court below, and perhaps others, as well—and that its absence unjustly impeded petitioner's effort to have the respondents' decision expeditiously reviewed, and brought another meritless appeal to this Court—the record plainly shows. Too, the decision of the majority is based upon the unsound, though implicit, premise that the law requires us to restrict our view to just that little portion of the order that respondents appealed from and to validate the rest of the order, however invalid it may be, because petitioner abandoned its appeal with respect thereto. I know of no such law and if there was one it would not be in harmony with either nature or the rest of our jurisprudence. A branch doesn't exist without regard to the tree it grows from; and striking the line and a half that the respondents object to from the order, while permitting the more grossly invalid remainder which it grew from and depends upon to stand, is an incongruity that my mind cannot reconcile. And since respondents are responsible for the invalid remainder, I can think of no just reason why reconciliation should be attempted.

The record plainly reveals that:

- (1) At respondents' instance the court dismissed petitioner's petition for certiorari upon the foundationless misconception that a zoning board decision cannot be reviewed in the Superior Court, notwithstanding the filing of the statutory petition for certiorari, unless the zoning board members are also sued in a civil action and served with copies of the summons, and since the respondents had not been so served, the court had no jurisdiction over them.
- (2) The court did have jurisdiction of respondents and their decision on petitioner's special use application, since a

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petition for writ of certiorari and judicial review had been filed in court, as G.S. 160A-388(e) authorizes.

- (3) The court being governed by the law, rather than its misunderstanding of it, did have the power to designate the dismissal of the petition as being without prejudice and to permit petitioner to file "another action," even though doing so could have been of no benefit at all to petitioner.
- (4) The few words in the order that respondents complain of, which state that the dismissal of petitioner's petition for certiorari was "without prejudice to the commencement of a new action by Petitioner based on the same claims within 30 days," are not independent and self-sustaining as a whole; but, like the tail of a kite, they exist only because of the rest of the order, and since the order cannot stand because it is patently and totally erroneous, the few words respondent appealed from fail along with the rest.
- (5) Respondents' position in the trial court was totally without merit, and they had no proper basis for appealing to this Court.

In our jurisprudence, from the earliest times, certiorari has been understood as being a substitute for appeal. *Gidney v. Hallsey*, 9 N.C. 550 (1823). McIntosh N.C. Practice and Procedure in Civil Cases §§ 705, 706 (1929). It has been so considered and used in reviewing zoning board decisions for generations. *In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E. 2d 1 (1941). From the very nature of things, appealing from a zoning board or any other inferior tribunal while simultaneously initiating an original civil action in the reviewing court would be an incongruous absurdity that the law could not tolerate, much less require. In the only recorded instance in this state that I am aware of where appellate review of a zoning board decision was sought by a civil suit with summonses issued to the zoning board members, the Court noted the inappropriateness of such a proceeding before choosing to treat the improperly filed suit as a petition for certiorari. *Deffet Rentals, Inc. v. The City of Burlington*, 27 N.C. App. 361, 219 S.E. 2d 223 (1975). In enacting G.S. 160A-388(e), which replaced a statute originally enacted in 1923, the Legislature understood all this and the simple, expeditious appellate and

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review procedure authorized and followed through the years should not be encumbered by trial judges requiring a purposeless, duplicating civil action to be filed.

Though under the peculiarly convoluted rules that govern repeated litigation between the same parties about the same matter the petitioner might very well be estopped at some future time to claim that the court below ever had jurisdiction of the respondents in this proceeding, we are under no such constraints. The court below did have jurisdiction of the respondents and sound judicial principles require us to so declare, it seems to me, lest other property owners seeking a judicial review of respondents' decisions encounter the same misplaced obstructions that petitioner did.

My vote, therefore, is to dismiss respondents' appeal and to reverse the judgment appealed from in its entirety.

IN THE MATTER OF: ELIZABETH LOWERY, DISABLED ADULT, AND LUTHER LOWERY
AND WIFE, IDA MAE LOWERY, CARETAKERS, ROUTE 1, BOX 156, SHANNON, N.C.

No. 8216DC1361

(Filed 6 December 1983)

Appeal and Error § 57; Social Security and Public Welfare § 1— decision concerning protective services for disabled adult—insufficient finding to support conclusion

In an action brought under the "Protection of the Abused, Neglected, or Exploited Disabled Adult Act," the trial court's findings were insufficient to support the conclusion that the adult was not abused and that there was no evidence of neglect or exploitation. G.S. 108A-101(a); G.S. 108A-104; G.S. 108A-105; G.S. 1A-1, Rule 41(b); and G.S. 1A-1, Rule 52(a).

APPEAL by petitioner from *Richardson, Judge*. Judgment entered 3 August 1982 in District Court, ROBESON County. Heard in the Court of Appeals 29 November 1983.

This is a proceeding, pursuant to Article 6 of Chapter 108A of the North Carolina General Statutes, instituted by the filing of a petition by the director of the Department of Social Services of Robeson County to obtain an order authorizing protective services and enjoining interference with protective services.

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In his petition the director of the Department of Social Services of Robeson County alleges:

The undersigned petitioner, Russell M. Sessoms, Director of Department of Social Services for Robeson County having sufficient knowledge to believe that the respondent, Elizabeth Lowery, is in need of protective services and that the respondents Luther Lowery and Ida Mae Lowery are caretakers of Elizabeth Lowery who should be enjoined from interfering [sic] with the provision of protective services to a disabled adult, to-wit: Elizabeth Lowery, who is in need of such services, and alleges as follows:

1. That Elizabeth Lowery is a disabled adult, twenty-two years of age and is a resident of and can be found in the above named county.

2. That the respondent Elizabeth Lowery is a disabled adult who is in need of protective services, based on the following specific facts: She is mentally incapacitated, unable to perform or obtain essential services for herself and she is without able, responsible, and willing persons, to perform or obtain essential services for her. She is in need of assistance in obtaining mental health needs, assistance in personal hygiene, food, clothing, and protection from health and safety hazards, protection from physical mistreatment and protection from exploitation.

3. That the respondent Elizabeth Lowery has consented to the receipt of protective services; however, she probably lacks the capacity to consent to the provisions of protective services by reason of her severe mental retardation.

4. That the respondents Luther Lowery and Ida Mae Lowery are the maternal grandparents of Elizabeth Lowery and her caretakers, and they have refused to allow the provision of protective services for Elizabeth Lowery and punish her every time she consults with a social worker from the Robeson County Department of Social Services, which punishment includes physical beatings.

5. That respondent Elizabeth Lowery has been abused and exploited by respondents Luther Lowery and Ida Mae Lowery, her caretakers, in that they have physically beat

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her, used her money and other financial means for their own profit or advantage and forced her to perform services that she is incapable of performing.

6. The names, addresses and some of the telephone numbers of persons who may be able to testify as to the facts according to this petition are as follows:

Mary Neil McDonald	Southeastern Regional Mental Health Center, southwest of the City of Lumberton on N.C. Highway 711. Telephone: 738-1431
Mary Stevens and Jenny Conrad	Southeastern Industrial Center N.C. Highway #72 Telephone: 738-8138
Henry C. Burnette	Rt. 1, Box 157, Shannon, N.C.
Catherin Harris	Rt. 1, Shannon, N.C.
Rogena Deese, Sue O. Kerns and Sue Lupo	Robeson County Department of Social Services, Lumberton, N.C. Telephone: 738-9351

Petitioner prays the court to hear this matter and to issue an order authorizing the provision of protective services and enjoining the caretaker respondents from interfering [sic] with the provision of protective services to Elizabeth Lowery. It is further requested that Russell M. Sessoms as Director of the Robeson County Department of Social Services be designated in the order as the party responsible for the performing or obtaining of essential services on behalf of the respondent Elizabeth Lowery or otherwise consenting to protective services in respondent's behalf.

The matter came on for hearing before Judge Richardson sitting without a jury. Attorney Robert Jacobson was appointed guardian ad litem for Elizabeth Lowery. The petitioner was represented by Joseph C. Ward, Jr., and the respondents were represented by William L. Davis, III, of Lumbee River Legal Services, Inc.

At the hearing, petitioner offered evidence tending to show the following facts: Elizabeth Lowery is a twenty-one year old re-

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tarded adult with an I.Q. of less than forty-three. Elizabeth lives with the respondents, who are her grandparents. Before coming to stay with respondents Elizabeth lived at O'Berry Center. Respondents removed Elizabeth from O'Berry Center two weeks after their youngest daughter, Mary, married and left the home. Mary was deaf and drew a disability check. Elizabeth draws supplemental security income (S.S.I.), which is paid to the respondent, Ida Mae Lowery. The only income of respondents, other than Elizabeth's S.S.I. check, is farm rent of five hundred dollars per year. In August, 1980 the Robeson County Department of Social Services received a protective service referral regarding Elizabeth. This referral was investigated and Elizabeth was enrolled in a workshop program. The petitioner offered evidence that Elizabeth was punished by being switched, spanked and beaten on more than one occasion by respondents. The evidence further showed that in March, 1982 Elizabeth was switched or beaten by Ida Mae Lowery and that these actions left marks, bruises, and abrasions on her arms, body, buttocks and legs which were visible some six days following the beating. The evidence further shows that employees of the Robeson County Department of Social Services and the Robeson County Mental Health Center attempted to instruct respondents in methods of controlling Elizabeth, but that the only methods of discipline used by respondents were switching, spankings and beatings. The Department of Social Services has suggested alternative placements for Elizabeth, but the respondents have rejected these. The evidence does show that the respondents provide a clean home for Elizabeth and that she has adequate food and clothing.

At the close of the petitioner's evidence, the respondents made a motion to dismiss the proceeding pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. The trial court then made the following findings of fact:

1. That there is a fatal variance in the Petitioner's evidence.

2. That there were two or three beatings administered to Elizabeth Lowery with marks left on her (such spankings were not abusive), however it is suggested that such spankings are not the proper way to discipline Elizabeth.

3. That there is no evidence of neglect or exploitation of Elizabeth Lowery.

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Based upon its findings of fact the court made the following pertinent conclusions of law:

1. That based upon the facts and the law the Petitioners have shown no right to relief.

2. That spankings or beatings administered to Elizabeth were not abusive; nor is there any evidence of any neglect or exploitation of her, and the Defendant's Motion to dismiss pursuant to Rule 41(b) should be allowed.

From an order dismissing the proceeding petitioner appealed.

Ward, Strickland & Kinlaw, by Joseph C. Ward, Jr., for the petitioner, appellant.

Lumbee River Legal Services, Inc., by William L. Davis, for the respondents, appellees.

HEDRICK, Judge.

Chapter 108A, Article 6, of the North Carolina General Statutes, entitled the "Protection of the Abused, Neglected, or Exploited Disabled Adult Act," sets out the circumstances and manner in which the director of a county department of social services may petition the district court for an order relating to provision of protective services to a disabled adult. The Act applies only to abused, neglected, or exploited adults who are disabled. N.C. Gen. Stat. Sec. 108A-101(a) defines "abuse" as "the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation by a caretaker of services which are necessary to maintain mental and physical health." The statute provides for petition to the district court for an order in two circumstances: first, when the adult consents to services but his "caretaker" interferes with the provision of such services, and, second, when the disabled adult lacks capacity to consent to protective services.

In the instant case the director who sought court intervention alleged that Elizabeth Lowery was disabled and that she had been abused and exploited by her grandparents so as to invoke the provisions of the Act. He contended that Elizabeth had consented to protective services and that her grandparents had interfered with the provision of services. He thus sought a court

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order, authorized by N.C. Gen. Stat. Sec. 108A-104, enjoining Mr. and Mrs. Lowery from further interference. The director further indicated that he believed Elizabeth to lack capacity to consent to protective services, and thus also sought a court order authorizing the provision of protective services under N.C. Gen. Stat. Sec. 108A-105.

Rule 41(b), North Carolina Rules of Civil Procedure, provides that in a non-jury trial the defendant may seek dismissal at the close of plaintiff's evidence on the ground that plaintiff has shown no right to relief. If the court grants a 41(b) motion, the Rule requires the judge to make findings of fact in accordance with Rule 52(a). The reason for this requirement is set out in *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973): "Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purpose of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts." *Id.* at 619, 194 S.E. 2d at 7 (citation omitted).

The trial judge in the instant case concluded that Elizabeth was not abused and that there was no evidence of neglect or exploitation. Our examination of the meager findings of fact made by the trial judge, however, reveals that they do not support the court's conclusion that Elizabeth was not abused. Indeed, the court's findings, such as they are, appear to support a contrary conclusion. The court found that "beatings" were administered, that these beatings left marks, and that "such spankings are not the proper way to discipline Elizabeth."

Whether "spankings or beatings" of a "disabled adult" amount to abuse within the meaning of N.C. Gen. Stat. Sec. 108A-101(a) depends on the circumstances under which such spankings or beatings are administered. Obviously, the trial judge in the instant case was of the opinion that the spankings and beatings administered to this twenty-one year old retarded adult were not abusive within the meaning of the statute; however, the judge did not make sufficient definitive findings regarding the facts and circumstances of this case to enable us to determine whether his conclusion is correct. In granting a motion under Rule 41(b), the trial judge has a duty to make definitive and

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detailed findings as to the subject of inquiry, so as to afford this Court "a clear understanding of the basis of the trial court's decision."

Examination of the remaining findings of fact made by the trial court reveals similar difficulties. The court's failure to specifically identify the "fatal variance in the Petitioner's evidence," referred to in Finding of Fact No. 1, precludes review of that portion of the order. Furthermore, we believe the finding that "[t]here is no evidence of . . . exploitation" to be unsupported by examination of the record. While the court, sitting as the trier of fact, was not obliged to give credence to petitioner's evidence in ruling on respondent's Rule 41(b) motion, the judge had a duty to make findings of fact in support of his ruling in this regard. This he failed to do.

Because of the court's failure to make findings of fact adequate to support the conclusions of law, the order appealed from is vacated and the cause remanded for a new hearing on all allegations contained in the petition and for new findings, conclusions, and entry of the appropriate order.

Vacated and remanded.

Judges BRASWELL and EAGLES concur.

SATOSHI OSHITA AND WIFE, MARYMI T. OSHITA v. LUCILLE M. HILL, ROY J. HILL, JAMES CLYDE LONG, JR. AND THE UNION COUNTY BOARD OF EDUCATION

No. 8220SC1027

(Filed 6 December 1983)

1. Easements § 6.2— prescriptive easement—substantial identity of boundaries

In an action to establish a prescriptive easement in a road, testimony as to the course and location of the road and that it was there before 1932 and has not changed since then was sufficient to establish the element of substantial identity of the way involved.

2. Easements § 6.1— prescriptive easement—adverse or hostile use

In an action to establish a prescriptive easement in a road, plaintiffs' evidence was sufficient to establish that the use of the road was adverse and

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hostile where it tended to show that the tenant of plaintiffs' predecessor in title used the road across the lands of defendants' predecessor in title between 1932 and 1974; permission to use the road was neither given nor sought; the tenant did extensive maintenance work on the road over the years; and when the predecessor in title of one defendant began grazing cattle and raising hogs on his land, he ran a fence along the road on each side, but neither landowner ever put a fence across the road nor otherwise interfered with its use.

3. Easements § 3— appurtenant easement

Where plaintiffs' predecessor in interest acquired an easement by prescription, and the easement was incidental to the use of what is now plaintiffs' property, it is an appurtenant easement that passed by succession to the plaintiffs.

4. Appeal and Error § 16.1— supplemental order by trial court after notice of appeal

The trial court had no authority to enter a supplemental order after notice of appeal had been given from the trial court's original judgment.

APPEAL by defendants from *Hairston, Judge*. Judgment entered 7 June 1982 in Superior Court, UNION County. Heard in the Court of Appeals 25 August 1983.

Plaintiffs own a 43-acre tract of land that is adjacent to two contiguous tracts totaling about 115 acres owned by the individual defendants, and a tract of about 29 acres owned by the defendant Board of Education. Plaintiffs sued to establish that their predecessors in title had acquired by prescriptive use the legal right to use a certain road that ran across the lands owned by the several defendants and their predecessors in title. The defendants denied the claim and pled various defenses.

In the jury trial on the prescriptive issue the defendants presented no evidence and plaintiffs' evidence tended to show that: The road ran from a house formerly occupied by a tenant of plaintiffs' predecessor in title to N. C. Highway 200. In doing so, it ran across the lands of defendants' predecessors in title a distance of several hundred feet. The land adjoining the road through the lands of the individual defendants was woods land, but the land adjoining the road through the predecessor in title of the Board of Education was open farm land on one side and pasture on the other. When the predecessor in title of the defendant Board of Education began grazing cattle on the pasture land and raising hogs on the open farm land, he ran a fence along the road on each side; but neither landowner ever put a fence across

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the road or otherwise interfered with its use. The tenant's mailbox was at the end of the road on the highway and he used the road almost daily from 1932 until 1974. During those years, the tenant maintained and improved the road at his own expense; on three different occasions, several years apart, he hired a motor grader operator to re-shape and clean out the ditches and scrape the roadbed. He also installed a concrete drainage pipe under the road and on two or three occasions through the years replaced a metal drainage pipe that was under the road when he first went there in 1932. The tenant neither asked for nor received permission to use the road, nor did any predecessor in interest of the defendants say anything to him about using the road, though he saw them from time to time when on the road. Through the years many other people having business with the tenant used the road without being challenged or questioned by the adjacent landowners. So far as the record reveals, no one occupied plaintiffs' property or used the road from 1974 to 1980. Since buying the property in 1980, plaintiffs have used another route to get to and from it.

The jury returned a verdict for the plaintiffs and judgment recognizing plaintiffs' easement was entered thereon June 7, 1982. By the judgment the court also appointed a registered surveyor to survey the road and taxed the expense of the survey as a cost of court to be pro rated among the defendants according to the percentage of the easement that crossed the lands of each defendant. All defendants noted their appeal from the judgment the same day it was entered.

July 18, 1982, after the survey was accomplished and the bill therefor in the amount of \$225 had been submitted, the court entered a supplemental judgment which described the easement by metes and bounds and taxed \$205.20 of the surveyor's bill against the Board of Education and the remaining \$19.80 against the individual defendants. The individual defendants did not perfect their appeals.

Perry & Bundy, by H. Ligon Bundy, for plaintiff appellees.

Charles D. Humphries for defendant appellant Union County Board of Education.

No briefs filed for defendant appellants Lucille M. Hill, Roy J. Hill, and James Clyde Long, Jr.

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PHILLIPS, Judge.

Defendant Board of Education contends the trial court should have granted its motions for a directed verdict and for judgment notwithstanding the verdict. This contention is valid, of course, only if the evidence, when considered in the light most favorable to plaintiffs, fails to support the existence of each and every element required to establish the easement by prescription that plaintiffs sued for. But the jury verdict must stand if plaintiffs' evidence tended to establish all the elements of their case, which are: that the use (1) was adverse, hostile or under claim of right; (2) so open and notorious that the true owners probably had notice of it; (3) was continuous and uninterrupted for a period of at least twenty years; and (4) involved a way that had substantial identity throughout the period involved. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). Defendant contends plaintiffs' evidence failed to properly establish the substantial identity of the way involved or that its use was adverse or hostile. We do not agree with either contention.

[1] Substantial identity of the easement simply means that the way used followed a reasonably definite and specific line during the period involved. "While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed." *Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E. 2d 371, 374 (1946). But since prescriptive ways are established by custom and usage, rather than by road builders and engineers, a metes and bounds description is not required; that the way can be identified and located from the testimony given is sufficient. The testimony of plaintiffs' chief witness as to the course and location of the road, that it was there before 1932, and has not changed since then, was sufficient to establish this element.

As for adverse or hostile use, no showing of acrimony or disputation is required; all that need be shown is that the use was not permissive and was exercised openly and notoriously with a claim of right that the servient property owner probably had notice of. *Dickinson v. Pake*, *supra*.

[2] Our decision that plaintiffs' evidence was sufficient to establish that the use of the road was adverse and hostile is supported by both *Dickinson* and *Potts*. In each of these cases the

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evidence showed that permission to use the road had neither been given nor sought, plaintiffs did the slight maintenance required to keep the road passable, and plaintiffs used the road for over twenty years as if they had a right to it; and in each case our Supreme Court held that the evidence was sufficient to establish that the use was not permissive, but hostile. Plaintiffs' evidence on this point showed the same things that the evidence in *Dickinson* and *Potts* did, but it did not stop there; it showed road maintenance work that was more extensive, frequent, costly and noticeable; and it also showed inaction and action by the landowner that indicated he believed he had no right to interfere with the road. Permitting, without protest, a strip of farm land to be scraped, packed down and ditched by a motor grading machine several different times over a period of years is, to say the least, some indication that the owner believed he could not do otherwise; building a fence along, rather than across, a road that traversed his farm lands is even more indicative of the same belief.

[3] The fact that plaintiffs have not personally used and maintained the road on a frequent basis since buying the property in 1980 is not significant. Their predecessors in interest acquired an easement by prescription; and since the easement was incidental to the use of what is now plaintiffs' property, it is an appurtenant easement that passed by succession to the plaintiffs. *Dickinson v. Pake*, *supra*. Nor does it matter that plaintiffs' predecessors in interest had other ways to get to and from the property during the years that the prescriptive right was being established. An easement by prescription, unlike a statutory cartway, is not based on need, but use. And that plaintiffs' predecessors had another way available to them tends to support plaintiffs' claim that the use was not permissive, since, nothing else appearing, there is no reason to give a way to one who already has one.

[4] Thus the judgment first entered herein is affirmed. But the supplemental judgment entered by the trial court is a nullity, as defendant contends. The appeal of the defendants from the original judgment deprived the trial court of the authority to make further rulings in the case until it returns from this Court. G.S. 1-294; *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981).

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The judgment entered 7 June 1982 is affirmed, the supplemental judgment is vacated, and the cause is remanded for such supplemental orders as the circumstances require.

Affirmed in part; reversed and remanded in part.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. WILFORD W. KILGORE

No. 8321SC201

(Filed 6 December 1983)

1. Constitutional Law § 50— speedy trial—no denial of right to

In a prosecution for obtaining money by false pretense, defendant failed to show that he was denied his constitutional right to a speedy trial even though a total of 123 days lapsed between the date of arrest and the date the trial began. While at no time did defendant initiate or concur in the delay in the trial of his case, defendant has not shown that the delay was due to the neglect of the prosecution, that he could have been tried earlier, or that he was prejudiced by the lapse of time. G.S. 15A-701(a)(1).

2. Criminal Law § 34.7— evidence of other offenses—properly admitted to prove intent, design, or guilty knowledge

In a prosecution for obtaining money by false pretense, the trial judge properly allowed evidence of similar transactions on the part of the defendant since the evidence was offered for the purpose of showing intent and design.

3. False Pretense § 3— obtaining property by false pretense—sufficiency of evidence

In a prosecution for obtaining money by false pretense, the trial judge properly denied defendant's motion to dismiss where the evidence tended to show that defendant indicated to a business owner that he was an authorized agent of Ambassadors of the World, and he was not; that defendant's representation that he was a duly authorized salesman was a purposeful deception pursuant to which he secured \$180.00 which he had no intention of turning over to the Ambassadors of the World; that the owner of the company gave defendant the \$180.00 with the understanding that defendant was an agent of the Ambassadors of the World; and that defendant by a purposeful misrepresentation of agency induced his victim to part with \$180.00.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered in Superior Court of FORSYTH County 5 October 1982. Heard in the Court of Appeals 25 October 1983.

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Approximately three weeks prior to 31 March 1982, defendant signed an independent contractor agreement with Ambassadors of the World, a discount marketing organization. As an independent contractor, defendant became a representative with Ambassadors' sales associates. A \$31.00 representative's fee was involved in being approved as a representative with the association. When defendant's \$31.00 check was returned twice for insufficient funds, Ambassadors of the World mailed the defendant notice that he would no longer be a representative after 31 March 1982 if the association did not receive proper payment. Ambassadors of the World received no payment from defendant.

On 9 April 1982, the defendant indicated that he was an authorized representative of Ambassadors of the World to James Hudgins, an agent and part-owner of Preferred Business Gas, Incorporated. Mr. Hudgins signed a business application for membership with Ambassadors of the World and paid defendant a \$180.00 membership fee. For reasons which are in dispute, Mr. Hudgins never received the represented benefits his payment to defendant was to acquire.

On 7 June 1982 defendant was arrested on a warrant charging him with obtaining money by false pretense. Probable cause was found on 1 July 1982, and a true bill entered 16 August 1982. On 24 September 1982 defendant filed a petition for a speedy trial, and trial began on 5 October 1982. Defendant was convicted of obtaining a check in the sum of \$180.00 under false pretenses and appeals judgment of imprisonment for a term of three years.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas B. Wood for the State.

Frye, Booth, Porter, and Van Zandt, by John P. Van Zandt, III for defendant appellant.

HILL, Judge.

[1] Defendant first contends the trial judge erred in denying his motion to dismiss based on the denial of his constitutional right to a speedy trial. We do not agree.

The North Carolina Supreme Court in *State v. Neas*, 278 N.C. 506, 510-11, 180 S.E. 2d 12, 15 (1971), stated that "[t]he probability

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of a delay is inherent in every criminal action, and the constitutional guarantee does not preclude good faith delays which are reasonably necessary for the State to present its case. The proscription is against purposeful or oppressive delays which the State could have avoided by reasonable effort." We are aware that every lawsuit is singular as to its facts, and reasonableness plays a part in the preparation and trial of each case. The facts in this case fail to show any purposeful or oppressive delay.

The defendant was wanted in four or five other counties, and the district attorney had agreed that he be tried first in Forsyth County. Although the warrant was not served on defendant at the time he was taken into custody on 4 June 1982, he was in effect under arrest from that time. The probable cause hearing was scheduled ten days after defendant was transferred to Forsyth County, and continued two weeks on motion of the State. Forty-six days lapsed thereafter to the date a true bill was returned on 16 August 1982. Defendant was arraigned the following week. He filed a petition for speedy trial a month later. In less than two weeks trial began. A total of 123 days lapsed from the date of arrest and the date the trial began.

We note defendant does not argue that he was denied a speedy trial under the provisions of G.S. 15A-701(a)(1), but addresses the matter as a constitutional matter. This provision of our "Speedy Trial Act" provides a defendant shall be brought to trial "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, *whichever occurs last.*" (Emphasis added.) Clearly, defendant has no rights thereunder.

The ends of justice afforded by a speedy trial are not best served when speed is placed before thorough and deliberate preparation for trial. While at no time did defendant initiate or concur in the delay in the trial of his case, defendant has not shown that the delay was due to the neglect of the prosecution, that he could have been tried earlier, or that he was prejudiced by the lapse of time. "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution." *State v. Johnson*, 275 N.C. 264, 269, 167 S.E. 2d 274, 278 (1969).

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[2] Defendant next contends the trial judge erred by permitting the State to introduce evidence of activities of the defendant which defendant argues are both uncharged and unrelated to the crime for which he was indicted. The facts upon which defendant bases this contention are not in dispute:

Defendant took the stand in his defense, and moved for a motion in limine to exclude any activities or similar occurrences taking place after 9 April 1982. The trial judge denied the motion. The defendant described his pattern of operation with regard to his business and relationship with the Ambassadors of the World. The court then permitted the prosecuting attorney to cross-examine the defendant concerning his procedure of operation involving the sale of another contract to an auto parts store in Winston-Salem for the Ambassadors of the World.

The trial judge did not err in allowing the State to offer evidence of similar transactions on the part of defendant. When the purpose of offering evidence of other independent offenses is to prove intent, design, or guilty knowledge, the evidence is admissible. *State v. Walton*, 114 N.C. 783, 18 S.E. 945 (1894); *State v. Hill*, 45 N.C. App. 136, 263 S.E. 2d 14 (1980). This evidence concerning the procedure of operation involving the sale of another contract for the Ambassadors of the World was relevant and admissible on the issues of intent and design in the offense of obtaining money by false pretenses. The judge, likewise, committed no error thereafter in his charge concerning this evidence.

[3] Finally, we find no error by the trial judge in denying defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence for failure to meet its burden of proof. The crime of obtaining property by false pretenses pursuant to G.S. 14-100 is defined as follows: (1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another. *State v. Cronin*, 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980). See *State v. Davenport*, 227 N.C. 475, 42 S.E. 2d 686 (1947). The evidence will withstand a motion to dismiss if there is substantial evidence of all essential elements of the offense. E.g., *State v. Brackett*, 306 N.C. 138, 291 S.E. 2d 660 (1982); *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981). We ex-

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amine the sufficiency of the evidence to establish the elements of the crime of false pretenses.

(1) *A false representation of a subsisting fact or a future fulfillment or event.* The testimony of the State's witnesses, Hudgins and Henderson, denotes that the defendant made a false representation of a subsisting fact or future fulfillment or event when he indicated on 9 April 1982 to Hudgins that he was an authorized agent of Ambassadors of the World. In fact, his authorization had been terminated in writing on 31 March 1982 for failure to pay a \$31.00 agent's fee.

(2) *A false representation calculated and intended to deceive.* The defendant's representation that he was a duly authorized salesman for Ambassadors of the World was a purposeful deception of the State's witness, Hudgins, part-owner of Preferred Business Gas, in order to secure the \$180.00 membership fee. The defendant admitted that at the time he accepted the \$180.00, he had no intention of turning the money or contract over to the Ambassadors. The defendant contends his intention was to cash the check for his immediate expenses, and then turn over the money and the contract when he became financially able to do so.

(3) *A false representation which does in fact deceive.* Hudgins testified that he wrote a check to the defendant rather than the company and signed the contract with the understanding from the defendant that membership recognition and materials would be forthcoming from the company. Although the defendant had no authorization to sell, he nevertheless did not turn over the contract or check to the company headquarters pursuant to his company's standard operating procedure. Thus, the victim got nothing for his money.

(4) *A false representation by which one person obtains or attempts to obtain value from another.* According to Hudgins' testimony and the defendant's own evidence, the defendant by a purposeful misrepresentation of agency induced his victim to part with \$180.00. The defendant used this money for his own purposes with no intention of turning these proceeds of the contract over to the home office. We conclude there was ample evidence to overcome defendant's motions to dismiss.

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No error.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. JUNIOR LEE NORRIS

No. 8313SC352

(Filed 6 December 1983)

1. Burglary and Unlawful Breakings § 5— first degree burglary—intent to commit rape—sufficiency of evidence

The State's evidence was sufficient to permit the jury to find that defendant broke into the house of the prosecutrix with the intent to commit the felony of rape therein so as to support conviction of defendant for first degree burglary where the prosecutrix testified that defendant pushed the door open, came in, started kissing her and pushing her toward the bedroom, and that he got her on the floor and began feeling her breasts.

2. Criminal Law § 15.1; Jury § 6— pretrial publicity—denial of change of venue and individual voir dire

The trial court did not abuse its discretion in the denial of defendant's motion for a change of venue and a sequestered individual voir dire of jurors where five newspaper articles attached to the motion were mostly factual accounts of the evidence uncovered by investigating law enforcement officers, and where defendant failed to include the voir dire examination of the jury in the record on appeal so that the record does not reveal that defendant exhausted his peremptory challenges, that he had to accept an objectionable juror, or that any juror was made aware of any prejudicial material.

3. Criminal Law § 66.9— photographic lineups not suggestive—independent origin of in-court identification

Pretrial photographic lineups were not unnecessarily suggestive because defendant was the only person in the second lineup who was also included in the first lineup. Furthermore, the trial court properly concluded that the photographic lineups were not unnecessarily suggestive and that an in-court identification of defendant was of independent origin where the court found that there was sufficient lighting in the victim's house to enable her to observe the facial features of her assailant for a period of approximately five minutes, and that the in-court identification was based solely on her observations on the morning of the crime.

4. Criminal Law § 138— aggravating factor—prior conviction—issue of indigency and lack of counsel

In a sentencing hearing, the initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. G.S. 15A-1340.4(e).

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APPEAL by defendant from *Lee, Judge*. Judgment entered 23 September 1982, in Superior Court, COLUMBUS County. Heard in the Court of Appeals 17 November 1983.

Defendant, Junior Lee Norris, was tried on an indictment charging him with first degree burglary in violation of G.S. 14-51.

The State's evidence tended to show the following. The prosecutrix was awakened from her sleep on 16 May 1982 at approximately 5:30 a.m. by a knock at the door. She looked out her living room window and saw a man on the porch. Upon opening the door, the man requested to use her telephone. She started to close the door, but the man did not allow her to do so. The prosecutrix testified: ". . . the man pushed the door open, came in, started kissing me and pushing me toward the bedroom. He got me on the floor and began feeling my breasts." At this point her small child woke up and started crying. The intruder told the prosecutrix to co-operate if she cared for the child's safety. He grabbed the woman by one arm and the child by the other and started walking through the house. The prosecutrix managed to escape and ran to a neighbor's house. When she returned the intruder was gone.

The prosecutrix was shown a six person black and white photographic line-up on 16 May 1982. She stated that two photographs resembled the intruder, but subsequently chose one photograph, a photograph of the defendant. From a color photographic line-up on 17 May 1982, the prosecutrix picked a photograph of the defendant as being the man who had attacked her.

Defendant's evidence tended to show that the defendant was with a friend from 6 a.m. to 8 a.m. on the morning of 16 May 1982. Also, a witness for the defense testified that he knew the prosecutrix and that she told him that the man who attacked her looked like one Toby Watts.

The jury found the defendant guilty as charged and the trial court entered judgment on the verdict, imposing an active sentence of imprisonment. Defendant appealed.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Michael W. Willis for defendant appellant.

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HILL, Judge.

In this appeal defendant's numerous assignments of error relate primarily to denial of his motion for directed verdict, denial of his motions for a change of venue and a sequestered voir dire of jurors, suppression of pre-trial identification, and the sentencing phase of his trial. We find the assignments to be without merit and find no error in defendant's trial.

[1] The defendant assigns as error the trial court's denial of his motion for directed verdict made at the close of the State's evidence and renewed at the close of all the evidence. The defendant contends the evidence was insufficient as a matter of law to sustain his first degree burglary conviction. We disagree.

To support a verdict of guilty of first degree burglary, evidence must exist from which a jury could find that defendant broke and entered a dwelling house at nighttime, with the intent to commit a felony therein. *State v. Wells*, 290 N.C. 485, 226 S.E. 2d 325 (1976); *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445 (1983). The intent to commit a felony must exist at the time of entry, but it is not necessary that defendant retain that intent throughout the intrusion. *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977); *State v. Rushing*, *supra*. The State chose to indict the defendant for breaking and entering with the intent to commit rape. Therefore, the State became obligated to furnish sufficient evidence of the specific felonious intent to commit rape, as alleged, i.e., that at the time defendant entered the house of the prosecutrix, he intended to have sexual intercourse with the prosecutrix by force and against her will. *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982); *State v. Rushing*, *supra*; see G.S. 14-27.2; see also G.S. 14-27.3.

The State's evidence was sufficient to permit a rational trier of fact to conclude that the defendant broke into the house of the prosecutrix with the intent to commit the felony of rape therein. The evidence relevant to the element of intent accrues from the testimony of the prosecutrix:

I started to close the door and the man pushed the door open, came in, started kissing me and pushing me toward the bedroom. He got me on the floor and began feeling my breasts. My son awoke and started crying. He told me if I

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didn't want my son hurt, to do as he said. He asked me if anyone else was in the house. Then he grabbed me in one arm and Nicholas [the child] in the other and started walking back through the house. I escaped and ran to the neighbor's house.

This testimony concerning defendant's acts bespeaks a nonconsensual sexual purpose and an intended forcible sexual gratification. Therefore, the State has provided a sufficient foundation to permit a trier of fact to infer that defendant intended to commit rape once he broke into the house. This assignment of error is overruled.

[2] Defendant also assigns as error the trial court's denial of his motions for a change of venue and a sequestered voir dire of jurors. These motions were based on the grounds that inflammatory publicity from the news media would prevent a fair trial and that inquiry concerning specific newspaper articles could not be accomplished without making all jurors aware of prejudicial material, thereby rendering it impossible to select a fair and impartial jury.

Defendant supports his motion by attaching five newspaper articles appearing in various newspapers before the time of defendant's trial. These newspaper accounts were mostly factual accounts of the evidence uncovered by investigating law enforcement officials and appear to be no more inflammatory or prejudicial than any coverage likely to be found in any jurisdiction to which the trial might be moved. See *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981); *State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325, *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3212, 49 L.Ed. 2d 1211 (1976). In addition, since defendant failed to include in the record the voir dire examination of the jury, the record does not reveal that the defendant exhausted his peremptory challenges, that he had to accept an objectionable juror, or that any juror was made aware of prejudicial material. Under these circumstances, neither abuse of discretion nor prejudice has been shown. Motions for change of venue and the allowance of individual voir dire and sequestration of jurors are vested in the sound discretion of the trial judge and, absent abuse of discretion, his ruling will not be disturbed on appeal. *State v. Johnson*, 298 N.C. 355,

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259 S.E. 2d 752 (1979); *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). This assignment of error is overruled.

[3] Defendant's next assignment of error relates to the trial court's ruling on his motion to suppress the pre-trial identification of defendant by the prosecutrix. The voir dire testimony of the prosecutrix reveals that she identified the defendant by choosing his picture from photographic line-ups shown her on 16 May 1982 and 17 May 1982. Defendant contends that the photographic line-ups were constitutionally remiss because the defendant was the only person included in the second line-up who was also included in the first line-up. Following the hearing the trial court entered findings of fact and conclusions of law and denied the motion. Applying the standard of setting aside a conviction only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification to the case under review, we find that the denial of defendant's motion was proper. *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968); *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981).

The trial court's findings of fact recite that there was sufficient lighting in the house to enable the prosecutrix to observe the facial features of her assailant for a period of approximately five minutes, and that the in-court identification of the defendant by the prosecutrix was based solely on her observations on the morning of the intrusion. The trial court's findings of fact are supported by the evidence and are therefore binding on appeal. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1973); *State v. Walker*, 54 N.C. App. 652, 284 S.E. 2d 155 (1981). Based on the trial court's findings of fact the trial court properly concluded that the out-of-court identification of defendant did not reveal unnecessarily suggestive procedures conducive to mistaken identification and that the in-court identification of defendant was of independent origin. This assignment of error is overruled.

[4] Defendant's final assignment of error addresses the trial court's reliance on defendant's prior criminal record as an aggravating factor during sentencing. Defendant contends the trial court's failure to make a finding concerning whether defendant was indigent at the prior proceeding, and if so, whether he was represented by counsel was error. We disagree. Defendant stip-

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ulated to his criminal record, but the record is silent concerning indigency or representation by counsel at any of his prior trials. Pursuant to G.S. 15A-1340.4(e), the initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). Defendant has failed to satisfy this burden; thus, this assignment of error is overruled.

We have carefully examined defendant's other contentions and we find no basis for reversal. Defendant Norris received a fair trial, free of prejudicial error.

No error.

Judges ARNOLD and BRASWELL concur.

ETHEL PLEMMONS AND HUSBAND, FRANK PLEMMONS v. LARRY WILLIE
STILES AND WIFE, JUDY HSUIMEI STILES

No. 8230DC1352

(Filed 6 December 1983)

1. Divorce and Alimony § 23— child custody—jurisdiction properly determined to be in North Carolina

In a child custody action instituted by the child's grandmother and step-grandfather, the trial court properly assumed jurisdiction pursuant to either G.S. 50A-3(a)(1) or (2) since the child resided with the plaintiffs for an almost continuous fifteen month period immediately preceding the commencement of the action, and since the child and the plaintiffs in this State have a significant connection with this State. As a proceeding in Texas was not commenced until after custody was awarded to plaintiffs in North Carolina, G.S. 50A-6 was not applicable.

2. Divorce and Alimony § 25.6— award of custody to grandmother and step-grandfather—no error

While the law presumes that the best interest of the child will be served by committing it to the custody of the parent, there was sufficient competent evidence to support an award of custody of the minor child to the plaintiffs who are the grandmother and step-grandfather of the child.

APPEAL by defendant Judy Hsuimei Stiles from *Leatherwood, Judge*. Order entered 22 July 1982 in District Court,

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GRAHAM County. Heard in the Court of Appeals 17 November 1983.

On 24 September 1980, plaintiffs instituted this action to obtain custody of Ethel Plemmons' granddaughter, Brenda Mei Stiles, who had been residing with plaintiffs for the previous fifteen months. Subsequently, plaintiffs were awarded temporary custody of the minor child. Upon motion of the defendant Judy Hsuimei Stiles Webb, the custody action was re-heard in July 1982 at which time the court ordered that temporary custody of the minor child remain with plaintiffs. From this order, defendant Judy Hsuimei Stiles Webb (hereinafter "appellant") appealed.

McKeever, Edwards, Davis and Hays by Herman V. Edwards for plaintiffs appellees.

Pachnowski & Collins by Joseph A. Pachnowski and Gerald R. Collins, Jr., for defendant appellant.

HILL, Judge.

The evidence presented at the custody hearing showed the following:

Defendants Judy Hsuimei Stiles and Larry Willie Stiles were married in 1970 in Taiwan. The minor child, Brenda Mei Stiles, was born of this marriage on 27 December 1971. Defendants are now divorced and Judy Stiles has since remarried. Larry Stiles has been living in Cherokee County, N.C., since 1979. Judy Stiles resides in Abilene, Texas, where she has lived since July 1977.

The minor child's residence has been as follows in relevant part: from January 1975 until July 1977, the child lived in Japan with the defendants; from July 1977 until June 1979, the child lived in Abilene, Texas, with the defendants; from June 1979 until 23 August 1980, the child lived with the plaintiffs at defendants' request in Cherokee County, N.C.; from 24 August 1980 until 19 September 1980, the child returned to Texas with defendants as part of their attempted reconciliation; from 20 September 1980 until the court's hearing in July 1982, the child resided with the plaintiffs in North Carolina.

In June 1979, Larry and Judy Stiles requested that the plaintiffs keep the minor child in their home in Cherokee County, N.C.,

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to which the plaintiffs agreed. In June 1980, Judy Stiles again requested that plaintiffs keep the child in their home and at that time executed an agreement in which she acknowledged that for the preceding 12 months plaintiffs had the care, custody and control of the minor child, that during such time period the child had resided with the plaintiffs in their home, and that it was her opinion that it would be in the best interest and welfare of the minor child to remain in the care, custody and control of the plaintiffs for at least the next 12 months.

Larry Stiles is an excessive user of alcohol and has indicated his desire that plaintiffs be awarded custody of the minor child. In the past, Judy Stiles worked outside the home to such an extent that she only saw her child approximately two hours a day but since remarrying she has ceased such work.

An abundance of evidence as to the minor child's living conditions and well being while in the care, custody and control of plaintiffs was offered at the hearings. This evidence tended to show that plaintiffs provided the child with a good home, good environment, good recreation, have taken her to religious services regularly, and that a great bond of affection has developed between the child and the plaintiffs. The child has done extremely well in school, is stable and normal emotionally, has many friends her own age in the community, and visits regularly with her father and her two half sisters who live nearby. The child told the court she wished to continue to live with the plaintiffs and that she was happy living with them.

The court found that the minor child and her family had a closer connection with the State of North Carolina than with any other state and that significant evidence concerning the child's care, protection, training and personal relationships was most readily available in this State. The court concluded that North Carolina was the "home state" of the minor child, that it had jurisdiction in this cause, and that it would be in the best interest and welfare of the child to remain in the temporary custody of plaintiffs. Appellant was granted visitation privileges.

[1] Appellant first argues the court erred in assuming jurisdiction over the custody action and that Texas is the State which should have jurisdiction. The relevant provisions of the Uniform Child Custody Jurisdiction Act are as follows:

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(a) A court of this State authorized to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) This State (i) is the home state of the child at the time of commencement of the proceeding, or

. . . .

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence relevant to the child's present or future care, protection, training, and personal relationships;

G.S. 50A-3(a).

"Home state" is defined as "the state in which the child immediately preceding the time involved lived with the child's parents, a parent, or a person acting as parent, for at least six consecutive months" G.S. 50A-2(5). A "[p]erson acting as parent" includes a person who has physical custody of a child or claims a right to custody, G.S. 50A-2(8), which includes the plaintiffs in this case.

We hold there was sufficient evidence to support the court's exercise of jurisdiction pursuant to either G.S. 50A-3(a)(1) or (2). The fact the minor child resided with the plaintiffs for an almost continuous 15 month period immediately preceding the commencement of this action is certainly sufficient to qualify North Carolina as the minor child's home state. The child's brief visit to Texas during this time period was not sufficient to prevent such a conclusion.

Furthermore, it is clear the child and the plaintiffs have a significant connection with this state as the plaintiffs and the child's father are North Carolina residents and the child resided in this state for a substantial period of time. Because there was available in this state substantial evidence relevant to the child's present or future care, protection, training, and personal relationships, which evidence was produced at the hearings, the court was also authorized to assume jurisdiction pursuant to G.S. 50A-3(a)(2).

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We reject appellant's argument that the court erred in assuming jurisdiction because there was a custody proceeding pending in Texas at the time of the commencement of this action involving these parties. There was not such a proceeding pending in Texas at the time plaintiffs filed their petition for custody; therefore, G.S. 50A-6 was not applicable. Plaintiffs filed their petition on 24 September 1980 and the court signed an order granting custody to plaintiffs the next day. The proceeding in Texas relied upon by appellant was not filed until 26 September 1980.

[2] Next appellant argues the court erred by awarding custody of the minor child to the plaintiffs who are the grandmother and step-grandfather of said child when the evidence failed to establish that appellant was unfit as the child's mother and when the court affirmatively found appellant to be a person of good character and reputation. We disagree.

G.S. 50-13.2(a) provides that the court shall award the custody of a minor child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child. While it is true the law presumes that the best interest of a child will be served by committing it to the custody of a parent, when the parent is a suitable person, *In re Hughes*, 254 N.C. 434, 119 S.E. 2d 189 (1961), it has been held that "the welfare of the child is the paramount consideration to which all other factors, including common law preferential rights of the parents, must be deferred or subordinated" *Griffith v. Griffith*, 240 N.C. 271, 278, 81 S.E. 2d 918, 923 (1954).

The court in child custody cases is vested with broad discretion. The trial judge's decision will not be upset in the absence of a clear showing of abuse of discretion, if the findings are supported by competent evidence. *Sheppard v. Sheppard*, 38 N.C. App. 712, 248 S.E. 2d 871 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979). Furthermore, this court has held that the court's discretion is such that it "is not required to find a natural parent unfit for custody as a prerequisite to awarding custody to a third person." *In re Kowalzek*, 37 N.C. App. 364, 368, 246 S.E. 2d 45, 47 (1978).

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Here the court's findings of fact are supported by competent evidence and there is no evidence of an abuse of discretion. Therefore, the decision of the trial court is

Affirmed.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. ROY EDWARD YOUNG

No. 832SC287

(Filed 6 December 1983)

1. Criminal Law § 75.7— statements by officer—reasonable expectation of incriminating response—custodial interrogation

Statements made by a police officer that he wondered who owned a paper bag with a pocketbook concealed inside and that it belonged either to defendant or to another named person were of such nature that the officer should have reasonably known that they might elicit an incriminating response from defendant, and defendant's response that the pocketbook was his was inadmissible in defendant's trial for possession of narcotics found therein where defendant had not been given the *Miranda* warnings.

2. Criminal Law § 75.5— in-custody statements—necessity for *Miranda* warnings—knowledge by defendant of rights

The trial court erred in admitting defendant's in-custody statements made without the benefit of *Miranda* warnings on the ground that defendant knew of his constitutional right to remain silent and that anything he said might be used against him. Furthermore, the admission of the statements constituted prejudicial error where defendant's admission was the primary evidence of the ownership of a pocketbook in which narcotics were found.

APPEAL by defendant from *Bruce, Judge*. Judgment entered 28 October 1982 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 15 November 1983.

Defendant appeals from a judgment of imprisonment entered upon his conviction of felonious possession of marijuana and LSD.

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

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WHICHARD, Judge.

I.

Defendant contends, *inter alia*, that the court erred in admitting his in-custody statements made without the benefit of the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). We agree, and accordingly award a new trial.

II.

The pertinent facts are:

As police prepared to take defendant into custody on unrelated charges, they observed him "lunging" toward an acquaintance's car and apparently placing a brown paper bag inside it. After defendant left the scene with one officer, another officer approached the car, in which two men were sitting. He saw a brown paper bag in the back with a pocketbook protruding from it, and asked the driver if the bag belonged to him. The driver answered no. The officer also requested and received the bag and took it to the sheriff's department.

The court found that as the officer walked into the sheriff's department "he was strutting and holding up the pocketbook and paper bag with the pocketbook concealed inside"; and that the following conversation ensued:

OFFICER: "I wonder whose this is."

DEFENDANT: "It ain't mine. You didn't get it from me."

OFFICER: "I wonder whose this is."

DEFENDANT: "It ain't mine."

OFFICER: "It's yours or Duke's one."

DEFENDANT: "It's mine, I'm not going to get Duke in trouble."

The officer then searched the pocketbook and found controlled substances.

The court also found that at the time defendant made the statement he was in custody, and the officers had not "warned [him] of any rights"; and that "[t]he nature of [the] statements was

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such that there was a reasonable possibility that [they] might invoke a response from the defendant." Competent, uncontroverted evidence supports these findings.

The court further found, however, on the basis of an extended discussion with defendant in chambers, in which defendant demonstrated a general understanding of criminal procedure, that

[n]otwithstanding the fact that the defendant had not been warned of his right to remain silent and that anything he said could be used against him in Court, the defendant knew of his constitutional right to remain silent and knew that anything he said might be used against him in Court.

It then found, on that basis, that defendant's statements in response to the officer's statements "were made freely, voluntarily and understandingly . . . with full understanding of his right to remain silent and with full understanding that his statement would be used against him in court"; and it ordered the statements admitted.

III.

[1] Absent required warnings prior to interrogation, the Constitution of the United States precludes admission of statements, whether exculpatory or inculpatory, obtained during custodial interrogation of a criminal defendant. *Miranda v. Arizona, supra*; see *State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979). Under some circumstances actions or statements of officers may evoke a spontaneous statement by a defendant which may be admissible even absent the warnings. See, e.g., *State v. Ladd*, 308 N.C. 272, 279-81, 302 S.E. 2d 164, 170-71 (1983). However,

the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. 291, 300-01, 64 L.Ed. 2d 297, 307-08, 100 S.Ct. 1682, 1689-90 (1980).

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As noted above, the court found that the nature of the statements by the officer here "was such that there was a reasonable possibility that [they] might invoke a response from the defendant." That finding evoked the *Miranda* safeguards. *Id.* Admission of defendant's statements, in the absence of *Miranda* warnings, thus was constitutional error.

IV.

[2] The basis on which the trial court nevertheless admitted the statements, viz, that "[n]otwithstanding the fact that the defendant had not been warned of his right to remain silent and that anything he said could be used against him in Court, the defendant knew [these things]," is legally untenable. The State has not cited, nor have we found, any authorities which gloss the *Miranda* doctrine in this manner. On the contrary, it has been held that the protection afforded by the requirement of *Miranda* warnings exists for all, even a lawyer who was necessarily cognizant of his rights. *United States v. Farinacci-Garcia*, 551 F. Supp. 465 (D. Puerto Rico 1982). The court so holding stated:

The government's contention that, because [defendant] is a lawyer who is necessarily cognizant of his rights, the absence of *Miranda* warnings prior to custodial interrogation may somehow be excused has no support in constitutional case law. No consideration relevant to the constitutional protection against self-incrimination suggests any deviation based on distinct groups or classes of individuals who have knowledge of the law. The protection exists for all. It does not in any manner depend on the extent of the knowledge or notice of the state of the law that an individual may possess. Such a limitation could, indeed, lead to absurd and arbitrary distinctions.

Id. at 476.

V.

The State has not contended that admission of the statements was not error. It has argued, instead, that the admission was harmless in light of other circumstantial evidence tending to incriminate defendant.

Because [these] statement[s] [were] introduced in violation of defendant's constitutional rights under the Fifth and

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Fourteenth Amendments, he is entitled to a new trial unless we determine that the erroneous admission of this evidence was harmless beyond a reasonable doubt. G.S. 15A-1443(b). See *Chapman v. California*, 386 U.S. 18, 24, 17 L.Ed. 2d 705, 710-11, 87 S.Ct. 824, 828 (1967). To find harmless error beyond a reasonable doubt, we must be convinced that there is no reasonable possibility that the admission of this evidence might have contributed to the conviction. *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 11 L.Ed. 2d 171, 173, 84 S.Ct. 229, 230 (1963). See also *State v. Castor*, 285 N.C. 286, 292, 204 S.E. 2d 848, 853 (1974).

Ladd, supra, 308 N.C. at 284, 302 S.E. 2d at 172. Here, defendant's admission was the primary evidence of ownership. To rebut defendant's ownership there was evidence that a third person, who was not questioned, was sitting in the back seat beside the bag which the officer seized. Also, although the officer testified that he saw defendant place a bag in the car, there was no evidence that this was the only bag in the car. Further, defendant had other bags in his own vehicle and was confused as to which bag the officer had. In light of this evidence, the State has failed to prove that "there is no reasonable possibility that the admission of this evidence might have contributed to the conviction." *Id.*; see also *State v. Silva*, 304 N.C. 122, 133, 282 S.E. 2d 449, 456 (1981).

New trial.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA EX REL. DAVID C. EVERETT, JR. v. IRA M.
HARDY, II

No. 822SC1313

(Filed 6 December 1983)

- 1. Domicile § 2; Witnesses § 6— domicile of defendant for voting purposes—evidence properly admitted**

In an action in which plaintiff alleged that defendant was not a resident of the Town of Bath and was thus ineligible to serve on the Bath Town Council,

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the trial court properly admitted testimony concerning past disagreements between plaintiff and defendant over location of a marina in Bath since such testimony probed the possible bias of plaintiff.

2. Domicile § 2— domicile for election purposes—evidence concerning letter to Board of Elections properly admitted

In an action in which plaintiff alleged that defendant was not a resident of the Town of Bath and was thus ineligible to serve on the Bath Town Council, the trial court properly admitted testimony by defendant in which he stated he had written a letter to the County Board of Elections concerning his eligibility as a voter since such evidence was relevant to the issue of whether defendant had usurped, intruded into, or unlawfully held his public office. G.S. 1-515(1) and G.S. 1-527.

3. Appeal and Error § 24— failure to object to testimony—waiver of right to argue on appeal

Plaintiff waived his right to argue the admission of certain testimony on appeal by failing to object to earlier identical testimony.

APPEAL by plaintiff from *McConnell, Judge*. Judgment entered 28 April 1982 in BEAUFORT County Superior Court. Heard in the Court of Appeals 14 November 1983.

Plaintiff, the relator in this action in the nature of *quo warranto*, alleged that defendant is not a resident of the town of Bath and is thus ineligible to serve on the Bath Town Council. Plaintiff's evidence tended to show that defendant owns a home in Greenville, that he works there during the week and on some weekends, and spent more time in Greenville than in Bath during the years 1977 through 1981. Defendant maintains a bank account in Greenville and listed his Greenville address on his income tax returns. Defendant's testimony tended to show that he is a neurosurgeon and that he has owned a home in Greenville since 1968. Defendant is associated with a hospital in Greenville whose regulations require him to maintain a home there, to be on call eighteen weekends per year, and to perform occasional night duty. Defendant purchased a home in Bath in 1971, and he and his family began spending weekends there beginning on Labor Day of 1972. In late 1975, defendant injured a hand and temporarily retired from the practice of medicine. He moved to Winston-Salem to attend law school in the fall of 1976, but withdrew after about two months and returned to Bath. In early 1977, defendant changed his voter registration from Pitt County to Beaufort County, joined a church in Bath and listed taxes in Beaufort

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County. Defendant lived continuously in Bath from late 1977 until Labor Day of 1978, while recuperating from surgery on his injured hand. Defendant belongs to a number of civic and religious organizations in Bath and regards Bath as his permanent home.

The jury found that defendant was a resident of Bath at the time of the 1981 elections and was thus qualified to vote and hold a seat on the town council. Upon entry of judgment upon the verdict, plaintiff appealed.

Michael A. Paul for plaintiff.

James, Hite, Cavendish & Blount, by Charles R. Hardee, G. Wayne Hardee and Marvin Blount, Jr., for defendant.

WELLS, Judge.

[1] In his first assignment of error, plaintiff contends that the trial judge erred in admitting testimony concerning past disagreements between plaintiff and defendant over location of a marina in Bath. Plaintiff argues that the testimony is irrelevant and tended to distract the jury from the issue of defendant's domicile. It is well-established that "[a] party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation." *State v. Hart*, 239 N.C. 709, 80 S.E. 2d 901 (1954). See also Brandis, "North Carolina Evidence," § 45 (2d rev. ed. 1982); Annot., 74 A.L.R. 1157 (1931).

We hold, therefore, that defendant's cross-examination of plaintiff concerning the disagreements over location of the marina was a proper means of probing possible bias of plaintiff. Under the general rule that bias of a witness may be proven by extrinsic evidence, including the testimony of third parties, such testimony by other witnesses at the trial was relevant and admissible, *McCormick, Evidence*, § 41 (1972). Once some evidence of bias is shown, it is within the trial judge's discretion to determine how much additional testimony will be admitted. *Id.* This assignment of error is overruled.

[2] Plaintiff next argues that it was error for the trial judge to admit defendant's testimony concerning hearings held by the

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Beaufort County Board of Elections. Plaintiff argues that the testimony was hearsay and prejudicial in that it was likely to influence the jury's decision.

The testimony to which plaintiff objects as hearsay was a line of questions addressed to defendant as follows:

Q. And you have been through a hearing in front of the Board of Elections, haven't you?

. . . .

A. I have.

Q. With this same issue being brought, except by Mr. Red Everett?

A. That is correct.

(Plaintiff objects)

. . . .

Q. Now in September of 1981, did you write a letter to the Beaufort County Board of Elections?

A. I did.

. . . .

Q. Why did you write that letter?

A. I wanted my eligibility as a voter and prospective office holder to be looked at by the County Board of Elections.

Q. And why did you want that looked at?

A. Because there was some question, someone had written.

(Plaintiff objects)

. . . .

I wrote a letter to Mr. G. T. Swinson, Chairman of the Board of Elections, Washington, North Carolina and received a response from that letter.

The responses given by defendant were not hearsay, as defendant testified only as to what he had done. Further, he did

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not testify as to the results of the inquiry to the board of elections. Such evidence was relevant to the issue before the jury, that is, whether defendant had usurped, intruded into, or unlawfully held his public office. See G.S. § 1-515(1) and G.S. § 1-527. Our review of relevant prior cases shows that evidence of results of prior board of elections investigations has been admitted in other *quo warranto* proceedings in this state. See e.g., *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 67 S.E. 2d 292 (1951), and cases cited therein. This assignment is overruled.

[3] In his third assignment of error, plaintiff argues that the trial judge erred in permitting defense witness Judith Edwards to testify that defendant told her that he considered Bath to be his home. Plaintiff waived his right to argue this error on appeal by failing to object to identical testimony from other witnesses at trial. See *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980), *State v. Byrd*, 40 N.C. App. 172, 252 S.E. 2d 279, *cert. denied*, 298 N.C. 301, 259 S.E. 2d 915 (1979), *Brandis, supra*, § 30.

Next, plaintiff argues it was error for the trial judge to permit testimony that plaintiff's father had previously challenged defendant's right to serve on the Bath Town Council. Plaintiff has waived his right to argue this error on appeal by failing to object to earlier identical testimony. Further, the issue has some relevance on the issue of possible bias of plaintiff against defendant, as discussed under plaintiff's first assignment of error.

Finally, plaintiff argues that the trial judge erred by denying his motion for a mistrial. The record shows that defense witness Dot Tankard testified that plaintiff's attorney, John Wilkinson, told her that he would "get the goddamned son-of-a-bitch (Dr. Hardy) if it cost him every penny he had." While a new trial may be granted for any irregularity which prevents a party from obtaining a fair trial G.S. § 1A-1, Rule 59 of the Rules of Civil Procedure, "[t]he possible right to a new trial . . . may be lost if it is not protected by the taking of a proper exception when the irregularity occurs." Shuford, N.C. Civ. Prac. & Proc. (2d ed. 1981), § 59-4. See e.g., *Gilbert v. Moore*, 268 N.C. 679, 151 S.E. 2d 577 (1966). Here, defendant failed to object and move for a mistrial promptly following Ms. Tankard's testimony, and this assignment is therefore overruled.

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No error.

Chief Judge VAUGHN and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. JACKIE C. NORFLEET

No. 8310SC153

(Filed 6 December 1983)

1. Criminal Law § 162— necessity for objection to evidence

Failure to object in apt time, even if testimony is incompetent, results in a waiver, and such testimony may be considered for whatever probative value it may have.

2. Criminal Law § 163— necessity for objection to instructions

Where defendant made no objection at trial to the court's instructions, defendant waived his right to assign error to such instructions on appeal.

3. Criminal Law § 163.3— failure to summarize evidence—no fundamental error requiring appellate review

Failure of the trial court to give an instruction summarizing the evidence was not so fundamental and material an error as to permit appellate review thereof in the absence of objection by defendant at the trial where the trial judge reiterated the evidence necessary to explain application of the law thereto. G.S. 15A-1232.

4. Criminal Law § 138— aggravating factor—prior convictions—absence of evidence as to indigency and counsel

The trial court did not err in using defendant's prior convictions as aggravating factors in sentencing defendant where there was no evidence whether defendant was indigent at the time of such prior convictions and whether he was represented by or waived counsel.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 20 October 1982. Heard in the Court of Appeals 20 October 1983.

Defendant was charged in separate indictments with second degree rape and second degree sexual offense. The jury found defendant guilty of both offenses, which were consolidated for judgment. Defendant appeals.

The State's evidence tended to show: During the evening of 16 July 1982, Robin Woods was walking down Jones Street in

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Raleigh, North Carolina, when defendant grabbed her, pulled her into some bushes, and forced her to have vaginal and anal intercourse. Ms. Woods did not consent to have intercourse with defendant. When Ms. Woods raised a soft drink bottle she had in her hand to hit defendant, he grabbed her arm and took the bottle. She tried to holler, but defendant covered her mouth. He threatened to kill her if she moved.

After completing the sexual acts, defendant showed Ms. Woods two I.D. cards. On one of the cards was defendant's photograph, and Ms. Woods recalled that the name printed on such card was Jackie N-O-R-F----T. The name "Anthony" was printed on the other I.D. card. The photograph on this card did not resemble her assailant.

Some time later that night, defendant let Ms. Woods leave. She walked to her home a couple blocks away and told her sister of the attack, whereupon her sister called the police.

Ms. Woods later identified defendant as her assailant from eight photographs shown her by the police. Ms. Woods was treated by a physician for a vaginal infection.

Defendant presented no evidence.

Attorney General Edmisten, by William B. Ray, Assistant Attorney General, for the State.

Office of the Appellate Defender, by James H. Gold, Assistant Appellate Defender, for defendant appellant.

VAUGHN, Chief Judge.

At trial, Ms. Woods' sister testified that she had never had any difficulty with Robin lying to her. Defendant now contends that this testimony was improperly admitted in that it was the witness' opinion of her sister's character. We find no merit in defendant's contention.

[1] Defendant, at trial, did not object nor move to strike the testimony now cited as incompetent. Failure to object in apt time, even if testimony be incompetent, results in a waiver, and such testimony may be considered for whatever probative value it may have. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534, cert. denied, 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970); 1 Bran-

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dis on North Carolina Evidence § 27 (1982). The only exceptions when the admission of such evidence should be reviewed on appeal are: (1) when the evidence is forbidden by statute; (2) when the evidence was an inadmissible confession by a criminal defendant; or (3) when the evidence is a result of questions from the trial judge or a juror. *State v. Blackwell, supra*; 1 Brandis, *supra* § 27. The instant case presents none of the situations requiring review by this Court. Defendant, not having objected to such testimony at trial, cannot, therefore, complain on appeal. We do not suggest that trial counsel was less than diligent in failing to object. In the context of the case being tried the questions and answers were relatively harmless. It is a rare case, indeed, when an appellate court should try to second guess the strategy of trial counsel.

Defendant's next assignment of error relates to the judge's role, pursuant to G.S. 15A-1232, in instructing the jury. The statute provides, in pertinent part:

In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence.

Defendant now contends that the trial judge committed reversible error by giving no summary of the evidence at all in his instructions to the jury. We find no merit in such contention.

Under Rule 10b(2) of the Rules of Appellate Procedure:

No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury

[2] At trial, before the judge had completed his final instructions to the jury, he called the attorneys to the bench and inquired whether either attorney had any further requests, additions, or corrections regarding the instructions to the jury. Both attorneys responded negatively. Defense counsel had the opportunity to make an objection out of the hearing of the jury. Having made no objection at trial, defendant waived his right to assign error to

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such instructions on appeal. See *State v. Owens*, 61 N.C. App. 342, 300 S.E. 2d 581 (1983).

[3] Defendant contends that regardless of the failure to object at trial, the error in this case was so fundamental and material as to mandate our power under Rule 2 of the Rules of Appellate Procedure to review the trial proceedings. We find no fundamental, material error in the jury instructions.

If defendant had objected at trial we would find his objection groundless because the judge complied, in substance, with G.S. 15A-1232. Defendant was charged with second degree rape and second degree sexual offense. Defendant presented no evidence. The State's evidence was simple and direct. In his charge, after explaining the elements of second degree rape, the judge charged, in pertinent part:

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the 16th day of July, 1982, Jack Norfleet grabbed Robin Woods who was walking down a street near her home, pulled her into some bushes, choked her, threatened her with his fists and threatened to kill her, and thereby had vaginal sexual intercourse with Robin Woods by inserting his penis into her vagina without Robin Woods' consent and against her will, then if you find all of these things from the evidence and beyond a reasonable doubt, it would be your duty to return a verdict of guilty of second degree rape.

However, if you do not so find or if you have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty.

After explaining the elements of second degree sexual offense, the Judge charged, in pertinent part:

Ladies and gentlemen, I charge that if you find from the evidence beyond a reasonable doubt that on or about the 16th day of July, 1982, the Defendant Jack Norfleet engaged in anal intercourse by inserting his penis into the anus of Robin Woods and that he did so by pulling her into some bushes, choking her, threatening her with his fists and threatening to kill her, and that this force was sufficient to overcome any resistance which Robin Woods might make,

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and that Robin Woods did not consent to the anal intercourse, and that the anal intercourse was against her will, then if you find all of these things from the evidence beyond a reasonable doubt it would be your duty to return a verdict of guilty of second degree sexual offense.

However, if you do not so find or if you have a reasonable doubt as to one or more of these things, then it would be your duty to find the defendant not guilty.

In such charge, the Judge reiterated the evidence necessary to explain application of the law to the evidence. G.S. 15A-1232; see *State v. Best*, 265 N.C. 477, 144 S.E. 2d 416 (1965).

[4] Defendant lastly argues that the trial court erred by using his prior convictions as aggravating factors in sentencing defendant, since there was no evidence whether defendant was indigent at the time of such prior convictions, and if so whether he was represented by or waived counsel. The argument is without merit. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

No error.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. CURTIS LEE BRADLEY

No. 833SC193

(Filed 6 December 1983)

1. Burglary and Unlawful Breakings § 5.5— felonious breaking and entering— sufficiency of evidence

In a prosecution for felonious breaking and entering, the evidence was sufficient to survive defendant's motion to dismiss where the evidence tended to show that a palm print was extracted from the crime scene which matched defendant's; an accountant in the firm broken into testified that he had never before seen defendant in the building; the window on which defendant's print was found led to the firm's computer room, not open to the general public, other than the accountant and staff employees; and defendant had never been employed by the accounting firm.

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2. Burglary and Unlawful Breakings § 6; Criminal Law § 60.5— felonious breaking and entering—failure to instruct on limited circumstances under which palm print evidence sufficient to support conviction—error

In a prosecution for felonious breaking and entering, the trial court committed prejudicial error by failing to instruct the jury as to the limited circumstances under which palm print evidence would be sufficient to support a conviction since defendant properly requested such an instruction and since the State relied primarily on fingerprint evidence to prove defendant's guilt.

APPEAL by defendant from *Reid, Judge*. Judgment entered 24 September 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 24 October 1983.

Defendant was charged with felonious breaking and entering and felonious larceny. After a jury trial, defendant was found guilty of felonious breaking and entering, not guilty of felonious larceny, and was sentenced to a term of six years.

The State's evidence tended to show: Some time between 6:00 p.m. on 17 June 1982 and the early morning hours of 18 June 1982, someone broke into an accounting office on Pollock Street, in New Bern, North Carolina, and stole a television set, a radio, and an adding machine. The television set was a bulky console, which would have required two people to carry and lift.

At around 2:00 a.m. on 18 June 1982, Police Captain James McConnor observed defendant and one David Buck standing on a street corner about two and a half blocks from the accounting office broken into. David Buck was wearing knickers and a white cap.

Also at around 2:00 a.m. on 18 June, one Guy Boyd was awakened by the barking of his dog and looked out his window. He observed two men, trying to avoid being seen by passing automobiles. One of these men had on knickers and a cap.

Some time on 18 June, Police Officer Kirby Wetherington discovered the television set, radio and adding machine near Boyd's home. After searching the area, Officer Wetherington discovered that the back window of the accounting office had been broken, that a brick lay on the floor next to the window, and that the doors had been opened. He observed items scattered around the office and an impression left on the rug where there had once been a television set.

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Investigative Sergeant Donald Sykes was shown the broken window, from which he extracted a latent print. The print was sent to Mr. Robert Duncan, a latent print examiner for the SBI in Raleigh. Investigator Duncan was qualified as an expert, specializing in the field of identifying latent prints after comparison with prints of known suspects. Investigator Duncan found that the palm print on the windowpane matched defendant's. On cross examination, he testified that under ideal conditions, the palm print could have remained on the window for six months.

The property stolen from the accounting office belonged to Mr. Walter Paramore, an accountant. Mr. Paramore testified that he did not know defendant, that defendant had never been a client, and that he had seen defendant before, but never in the building. The broken window led to the office computer room, and Mr. Paramore testified that the computer room was open only to the accountants and staff employees. Defendant had never been employed by the office. The only people with keys to the office were Mr. Paramore, his three accounting partners, and one other employee. On cross examination, Mr. Paramore testified that from January to May his partners worked at night regularly and that, therefore, persons may have been admitted to the building whom he did not personally see.

Defendant offered no evidence.

Attorney General Edmisten, by Lucien Capone, III, Assistant Attorney General, for the State.

Ann B. Petersen, Assistant Appellate Defender, for the defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant, in his first argument, contends that the evidence was insufficient to withstand his motion to dismiss.

On a motion to dismiss, the evidence must be viewed in the light most favorable to the State, with the State receiving the benefit of every reasonable inference to be drawn therefrom. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). If there is sufficient evidence that the offenses charged were committed and that defendant was the perpetrator, then the motion is properly denied. *State v. Calloway*, 305 N.C. 747, 291 S.E. 2d 622 (1982);

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State v. Powell, supra. It is immaterial whether the evidence is direct, circumstantial, or both. *State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979). In light of the foregoing, defendant's motion was properly denied.

There is no question in this case that a crime was committed. The question, then, is defendant's guilt, which the State attempted to prove primarily through the use of fingerprint evidence. Robert Duncan, a qualified fingerprint expert, testified that the palm print on the window matched defendant's. The rule in a case involving fingerprint evidence is that a motion for dismissal or nonsuit is properly denied if, in addition to testimony by a qualified expert that the fingerprints at the scene of the crime match those of the accused, there is substantial evidence of circumstances from which a jury could find that the fingerprints were impressed at the time the crime was committed. *State v. Scott, supra*; *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975). What is substantial evidence is a question of law for the Court; what the evidence proves or not is a question for the jury. *State v. Scott, supra.*

In this case, there was substantial evidence from which a jury could find that defendant's print had been impressed at the time of the crime. Mr. Paramore, an accountant in the firm broken into, testified that he had never before seen defendant in the building. The window on which defendant's print was found led to the firm's computer room, not open to the general public, other than the accountants and staff employees. Defendant had never been employed by the accounting firm. The circumstances in this case are sufficient to support a reasonable inference and submit the question of defendant's guilt to the jury. We find much support for our position. *See, e.g., State v. Tew*, 234 N.C. 612, 68 S.E. 2d 291 (1951); *State v. Reynolds*, 18 N.C. App. 10, 195 S.E. 2d 581 (1973); *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969).

Defendant cites *State v. Scott, supra*, in support of his position that there was insufficient evidence to withstand his motion. Such case is, however, distinguishable. In *State v. Scott*, defendant's palm print was found in a room where a family business had been conducted. Although the State's witness in that case testified that she had never seen defendant, she had never been

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home during regular business hours. The evidence in *State v. Scott* showed that the defendant could have been in the room for a lawful business purpose. The evidence in the case *sub judice*, on the other hand, indicates no lawful reason why defendant might have been in the firm's computer room. See *State v. Reynolds*, *supra*.

[2] Defendant next contends that the trial court erred by failing to instruct the jury as to the limited circumstances under which the palm print evidence would be sufficient to support a conviction, after defendant had requested such instruction in writing. We agree with defendant and find that the trial court's failure to instruct was prejudicial error.

During a jury conference, defendant requested an instruction to the effect that fingerprints corresponding to those of the accused were without probative force unless the circumstances showed that they could have only been impressed at the time the crime was committed. Defendant's requested instruction concerned a subordinate feature of the case since it did not relate to elements of the crime itself nor to defendant's criminal responsibility therefore. *State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976). Absent defendant's request, the jury instructions would have been entirely proper since a Court is not required to give instructions on subordinate features of a case. *Id.* When a requested instruction, however, is correct in law and supported by the evidence, the Court must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). The requested instruction in the instant case was a correct application of the law to the evidence.

The State relied primarily on fingerprint evidence to prove defendant's guilt. Defendant was entitled to have the jury instructed on the probative value of such evidence. The failure to so instruct constituted prejudicial error, entitling defendant to a new trial.

We note, finally, that the assistant district attorney initially assigned to prosecute the case was the son of the victim, Mr. Paramore. In light of the possibility of the appearance of a conflicting self-interest in prosecuting defendant, it was proper that the assistant district attorney recused himself. We suggest that someone else represent the State at defendant's new trial.

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New trial.

Judges WELLS and JOHNSON concur.

IN THE MATTER OF: THE WILL OF VILNA V. BAITY, DECEASED

No. 8222SC1316

(Filed 6 December 1983)

1. Rules of Civil Procedure § 60.2— relief from judgment—prior will not newly discovered evidence

In a proceeding to caveat a 1972 will, the discovery of a 1968 will did not constitute "newly discovered evidence" within the meaning of G.S. 1A-1, Rule 60(b)(2) which would permit the trial judge to order a new trial.

2. Judgments § 21— consent judgment—requirements for setting aside

A judgment in a caveat proceeding which incorporated a family settlement agreement constituted a consent judgment which could be set aside only upon proper allegation and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake.

3. Judgments § 21.2— consent judgment—no mutual mistake

In a proceeding to caveat a 1972 will, the parties' lack of knowledge of a 1968 will of the testatrix did not constitute a mutual mistake which would support an order setting aside a consent judgment incorporating a family settlement agreement where the parties' lack of knowledge of the 1968 will did not form the basis of the consent judgment and did not motivate or control their conduct in entering into the consent judgment. Even if propounders would not have entered into the consent judgment had they known of the 1968 will, their lack of knowledge of the will was at most a unilateral mistake since the existence of the will was of no consequence to the caveators and did not motivate their consent to the judgment.

4. Wills § 25— caveat proceeding—hearing to set aside consent judgment—attorney fees

Where the appellate court held that the trial court erred in setting aside a consent judgment in a caveat proceeding and directed that the consent judgment be reinstated, the trial court was without authority to order the payment of attorney fees as part of the court costs at the hearing to set aside the consent judgment. G.S. 6-21(2).

ON writ of certiorari to review the order of *DeRamus, Judge*, entered on 5 February 1982 in Superior Court, DAVIE County. Heard in the Court of Appeals 15 November 1983.

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This is a proceeding filed in the Superior Court to caveat the last will and testament of Vilna V. Baity, dated 19 April 1972. The matter came on for trial on 27 July 1981, following which the jury duly sworn and empaneled to hear the proceeding reported to the court that it could not reach a decision, whereupon settlement negotiations between the caveators and propounders "began in earnest." The parties entered into a "Family Settlement Agreement," wherein the propounders agreed to accept as their share of the estate the property they would have received had Vilna Baity died intestate in addition to two tracts of land containing approximately 8.35 acres. The agreement provided that the caveators would receive as their share of the estate what they would have received had Vilna Baity died intestate, less the two tracts of land to be given to the propounders.

In accordance with the Family Settlement Agreement the judge peremptorily instructed the jury to answer the issues in favor of the caveators by declaring the paperwriting dated 19 April 1972 not to be the last will and testament of Vilna Baity. On 30 July 1981 the court entered judgment on the verdict, incorporating into the judgment the Family Settlement Agreement hereinbefore mentioned.

One day after entry of the consent judgment, another paperwriting dated 1 February 1968 was discovered among the valuable papers of Vilna Baity, wherein she devised her property to her two sisters, the propounders, just as she had done in the 1972 paperwriting.

On 9 November 1981, more than 60 days after entry of the consent judgment, the propounders filed a motion pursuant to the North Carolina Rules of Civil Procedure, Rule 60(b)(1), (2), and (6), to be relieved of the consent judgment.

On 5 February 1982, after a hearing, Judge DeRamus made findings and conclusions and entered an order setting aside the consent judgment and Family Settlement Agreement and ordered a new trial. The caveators gave notice of appeal and on 16 August 1982 they filed a petition for writ of certiorari which was allowed by this court on 30 August 1982.

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White and Crumpler, by William E. West, Jr., and Craig B. Wheaton, for the propounders, appellees.

Brock & McClamrock, by Grady L. McClamrock, Jr., for the caveators, appellants.

HEDRICK, Judge.

Caveators assign error to the court's decision to set aside the judgment incorporating the Family Settlement Agreement. They contend that the court's order was unsupported by appropriate findings and conclusions.

[1] Although the propounders' motion for relief from the judgment was made pursuant to Rule 60(b)(1), (2), and (6), North Carolina Rules of Civil Procedure, the order of the trial judge does not specify the rule pursuant to which he purported to act. Because the judge found there was "newly discovered evidence" and ordered a new trial, we assume he acted pursuant to Rule 60(b)(2). We believe, and the propounders concede in their brief, that the discovery of the 1968 paperwriting is not "newly discovered evidence" within the meaning of Rule 60(b)(2). We thus hold that the court's action in setting aside the judgment dated 30 July 1981 and ordering a new trial on the grounds of newly discovered evidence was clearly erroneous. We further believe it clear that, under the circumstances of this case, Rule 60(b)(1) has no application, nor does it appear that Judge DeRamus based his ruling on "mistake, inadvertence, surprise, or excusable neglect." We thus turn to a consideration of the application of Rule 60(b)(6) to the facts of this case.

[2] Caveators contend that the judgment dated 30 July 1981 is properly characterized as a consent judgment, and that any attack on the judgment is thus governed by the special rules that have developed regarding consent judgments.

A consent judgment has been defined by this court as "the contract of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval." *Blankenship v. Price*, 27 N.C. App. 20, 22, 217 S.E. 2d 709, 710 (1975). Because a consent judgment incorporates the bargained agreement of the parties, such a judgment may be attacked only on limited grounds: "It cannot be . . . set aside except upon proper allega-

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tion and proof that consent was not in fact given or that it was obtained by fraud or mutual mistake, the burden being upon the party attacking the judgment." *Id.* When parties seek to attack a consent judgment on the basis of mutual mistake by way of a motion in the cause, Rule 60(b)(6) controls. See N.C. Civ. Prac. & Proc. (2d Ed.), Sec. 60-11.

The judgment in the instant case, incorporating the bargained-for settlement agreement of the parties, is clearly a consent judgment. Because the record reveals neither evidence nor allegation of fraud or lack of consent, we turn our consideration to propounders' contention, contained in their brief, that the consent judgment was the product of mutual mistake.

Our Supreme Court discussed the doctrine of mutual mistake at some length in *Financial Services v. Capitol Funds*, 288 N.C. 122, 217 S.E. 2d 551 (1975):

[A] contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. . . . Generally speaking . . . in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words, it must be of the essence of the agreement, the sine qua non, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties.

Id. at 135-36, 217 S.E. 2d at 560 (citations omitted).

[3] Propounders contend the lack of knowledge of the existence of the 1968 paperwriting purporting to be a will prepared by Vilna Baity was a mutual mistake of the parties that supports the judge's order setting aside the consent judgment. We do not agree. While the existence of the 1968 paperwriting might have been an unknown fact, common to all parties to the caveat proceeding, this fact was not material. The parties' lack of knowledge of such a will did not form the basis of the consent judgment and did not motivate or control their conduct in entering into the agreement to settle the caveat proceeding by the consent judgment embodying the Family Settlement Agreement. The consent

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judgment was clearly and unmistakably the product of the agreement of the parties when the jury reported that it was "deadlocked" and could not reach agreement regarding the issues submitted to it in the caveat proceeding.

Even if we assume, as propounders contend, that the existence of the 1968 paperwriting was a material fact, and that propounders would never have entered into the Family Settlement Agreement had they known of the document, their assumption to the contrary was at most a unilateral mistake. The existence or nonexistence of the 1968 paperwriting was of no consequence to the caveators and did not motivate their consent to the agreement. "A unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to avoid a contract or conveyance." *Id.* at 136, 217 S.E. 2d at 560.

Because the evidence is insufficient as a matter of law that the Family Settlement Agreement was based on mutual mistake as to a material fact, we hold that the court's findings and conclusions do not support the order setting aside the consent judgment entered 30 July 1981.

[4] Caveators also argue that "the court erred in failing to award attorney's fees as a part of the court costs at the hearing to set aside the family settlement agreement." The record reveals that the court's refusal to award attorney's fees was based on its decision to postpone any award until the matter was retried. N.C. Gen. Stat. Sec. 6-21(2) provides that the court may allow costs against either party or apportion costs, in its discretion, in caveat proceedings and certain other related matters. Since we have held that the court erred when it set aside the judgment incorporating the Family Settlement Agreement and ordered a new trial, and since we have directed that the consent judgment be reinstated, the trial court was without authority in the instant case to order the payment of attorney's fees as a part of the costs of the caveat proceedings. The court, the caveators, and the propounders were and are bound by the consent judgment.

The result is: the order appealed from is vacated and the cause is remanded to the Superior Court for entry of an order reinstating the consent judgment and Family Settlement Agreement.

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Vacated and remanded.

Judges WHICHARD and BECTON concur.

GARY GRIFFITTS, EMPLOYEE v. THOMASVILLE FURNITURE COMPANY,
EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 8210IC1286

(Filed 6 December 1983)

Master and Servant §§ 55.1, 68— workers' compensation—failure to show occupational disease or injury by accident

The Industrial Commission properly concluded that plaintiff had failed to show that he had sustained an injury by accident as defined in G.S. 97-2(6) and 97-52, and that plaintiff did not have an occupational disease as defined in G.S. 97-53(13) where the evidence tended to show that plaintiff's degenerative disc condition did not relate to his employment and that the herniation of plaintiff's disc was precipitated by lifting and twisting as part of plaintiff's normal work routine. G.S. 97-2(18).

APPEAL by plaintiff from the Industrial Commission. The opinion and award of the Full Commission was filed on 12 August 1982. Heard in the Court of Appeals 26 October 1983.

Plaintiff made a claim for workers' compensation after experiencing lower back pain on 28 August 1980. He had suffered from back pain prior to that date, but felt increased pain after handling heavy lumber during the course of his employment on 28 August 1980. Medical testimony revealed that plaintiff had degenerative disc disease and a herniated disc.

For many years prior to 1980, plaintiff had engaged in bending and lifting work for defendant-employer. He had also done bending and lifting work in connection with his farming and gardening activities outside the course of his employment. Plaintiff was performing his usual job in normal manner on 28 August 1980 when his back pain flared up.

Chief Deputy Commissioner Shuford held that plaintiff was not entitled to workers' compensation benefits. His findings of fact included the following statements to which no exception was taken.

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. . .

4. On 28 August 1980 plaintiff again started having pain in his back while doing his routine job of repetitive lifting and twisting. . . .

5. On 7 October 1980 plaintiff consulted Dr. Marc Kadyk, orthopedic surgeon of Boone. Plaintiff had herniated disc at the L5, S1 level. This herniation was precipitated by plaintiff's lifting and twisting activities while working for defendant employer on 28 October [sic, August] 1980. Plaintiff had an underlying degenerative disc condition. The disc involved had degenerated from the time plaintiff was born until the time of herniation and the degenerative condition was hastened by plaintiff's various types of physical activities through the years.

Commissioner Shuford concluded from these and other findings that plaintiff did not sustain an injury by accident as defined in G.S. § 97-2(6) and § 97-52, and that plaintiff did not have an occupational disease as defined in G.S. § 97-53(13).

The Full Commission affirmed and adopted Commissioner Shuford's opinion and award, with one commissioner dissenting. Plaintiff appealed.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Henry N. Patterson, Jr., and Jonathan R. Harkavy, for plaintiff.

William G. Mitchell for defendant.

WELLS, Judge.

The Industrial Commission's findings are conclusive on appeal when supported by competent evidence. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). Of course, the Commission's conclusions of law fall within the scope of appellate review. *Id.* Commissioner Shuford's findings recited above are supported by competent evidence; namely, the testimony of plaintiff and Dr. Kadyk. These findings in turn support the conclusions of law that plaintiff did not sustain an injury by accident or occupational disease. Consequently, the opinion and award must be affirmed.

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The evidence and findings indicate plaintiff suffered from two different, although related, ailments. The first was his degenerative disc condition. Dr. Kadyk testified that disc degeneration occurs naturally in everyone as they age. The rate of degeneration differs from person to person for reasons difficult to ascertain. The medical testimony expressly failed to establish a causal link between plaintiff's employment and his degenerative disc condition: "There is no way to tie the degenerative part in and relate it to employment."

Degenerative disc condition is not listed specifically in the schedule of compensable occupational diseases. G.S. § 97-53. The catch-all provision defines occupational disease as, "Any disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." G.S. § 97-53(13). The Commission's conclusion that plaintiff did not have an occupational disease is correct as to the degenerative disc condition since the condition was not shown to be "characteristic of and peculiar to" plaintiff's employment. There can be no compensation without a connection between the disease and the employment. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981).

For the same reason, plaintiff's degenerative disc condition fails to meet the statutory definition of a compensable injury by accident. G.S. § 97-2(6) defines "injury" as "only injury by accident arising out of and in the course of employment . . ." Moreover, the degenerative disc condition was a gradual deterioration occurring over years, which is excluded from the definition of "accident" in G.S. § 97-52.

The evidence and findings also indicate that plaintiff's main ailment, herniation of the disc, was precipitated by lifting and twisting done around 28 August 1980 as part of plaintiff's normal work routine. Because the disc herniation did not result from any unusual stress, we are constrained to hold that it was not an injury by accident. Injury by accident under G.S. § 97-2(6) means an injury caused by an unusual, unexpected interruption of the normal work routine. *Adams v. Burlington Industries, Inc.*, 61 N.C. App. 258, 300 S.E. 2d 455 (1983); *Porter v. Shelby Knits, Inc.*, 46

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N.C. App. 22, 264 S.E. 2d 360 (1980). *Adams* and *Porter* were both ruptured disc cases in which the employees received compensation because they placed abnormally great stress on their backs, thereby causing an injury by accident. Because plaintiff in the present case did not perform any unusual job activity that could have caused abnormal stress on his back, the Commission properly concluded that he did not sustain an injury by accident.

Nor does plaintiff's herniated disc qualify as an occupational disease under G.S. § 97-53(13). A rupture or hernia is an injury, not a disease. Past cases of this court have viewed herniated discs as injuries by accident instead of occupational disease. *See, e.g., Adams v. Burlington Industries, Inc., supra; Porter v. Shelby Knits, Inc., supra.* Moreover, G.S. § 97-2(18) states that,

. . .

In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

a. That there was an injury resulting in hernia or rupture.

. . .

d. That the hernia or rupture immediately followed an accident.

This statute requires proof of an accident causing the hernia before workers' compensation benefits may be paid, thus making the clear legislative intent that hernias be compensated only as accidental injuries and not as an occupational disease.

Evidence that plaintiff's disc rupture was made more predictable due to the diseased condition of his spine does not support a different result. For the reasons stated, the order of the Commission must be and is

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

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STATE OF NORTH CAROLINA v. MANUEL WILLIAMS

No. 8310SC267

(Filed 6 December 1983)

1. Receiving Stolen Goods § 2— possession of stolen goods—indictment—failure to allege goods were stolen

An indictment charging defendant with felonious possession of stolen goods was not invalid in failing to state that the goods possessed by defendant were stolen.

2. Receiving Stolen Goods § 5.1— possession of stolen goods—retail price as evidence of fair market value

Where a merchant has determined a retail price of merchandise which he is willing to accept as the worth of the item offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss in a prosecution for possession of stolen goods.

3. Larceny § 8; Receiving Stolen Goods § 6— larceny and possession of same property—no conviction for both—failure to instruct—error cured by verdict

Although the trial court erred in refusing to instruct the jury that defendant could not be convicted of both larceny and possession of the same property, the jury cured the trial court's error by convicting defendant of only the possession charge.

4. Criminal Law § 138— sentencing—prior convictions as aggravating factor—indigency and counsel—burden of proof

The burden is on the defendant to show the trial court at a sentencing hearing that his prior conviction may not be considered as an aggravating factor because he was indigent and was not represented by counsel at the time of the prior conviction.

APPEAL by defendant from *Farmer, Judge*. Judgment entered 15 September 1982 in WAKE County Superior Court. Heard in the Court of Appeals 14 November 1983.

Defendant was charged with stealing seven leather coats from the Sears store in Crabtree Valley Mall in Raleigh on 23 September 1981. Evidence for the State tended to show the following events. Defendant met a friend, George Tharrington, who was on the way to the mall and Tharrington agreed to give defendant a ride. The pair separated at the mall, but planned to meet at the car later. Some time later, defendant met Tharrington at the car, and asked Tharrington to drive to the other side of the mall. Tharrington and defendant entered the mall again and went separate directions. A security guard saw defend-

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ant walk out of a door near the Sears store with a brown suitcase, walk toward a car and put it inside the car. Defendant and Tharrington then drove away from the mall, but were stopped by police a short distance away. Seven leather coats with Sears price tags were found in the suitcase. Both Tharrington and defendant said they had never seen the suitcase before.

Evidence for defendant tended to show that defendant got a ride with Tharrington to Crabtree Valley Mall, but did not steal anything there. Defendant met a man named Sambo at the mall who asked him for a ride. Defendant said he thought Tharrington would give Sambo a ride, and the two went to Tharrington's car. Sambo placed a suitcase in the car, and returned to the mall. A short time later, Tharrington and defendant left the mall without Sambo. Defendant intended to keep the suitcase, which he suspected contained items stolen by Sambo.

Defendant was convicted of felonious possession of stolen property and sentenced to six years in prison. A mistrial was declared on a charge of felonious larceny against defendant after the jury was unable to reach a verdict. From entry of judgment upon the verdict, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney General Thomas J. Ziko, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant.

WELLS, Judge.

[1] In his first assignment of error, defendant argues that the indictment charging defendant with felonious possession of stolen goods fails to state that the goods were stolen and is thus fatally defective. This same argument was considered and rejected by this court in *State v. Malloy*, 60 N.C. App. 218, 298 S.E. 2d 735, *rev'd on other grounds*, 309 N.C. 176, 305 S.E. 2d 718 (1983). Defendant's assignment of error is overruled.

Defendant next argues that the trial judge erred in instructing the jury that the state's evidence tended to show that the suitcase and coats had a total value of \$814.98. To support a charge of felonious possession of stolen property, the State must prove the items taken had a value of more than \$400.00. G.S.

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§ 14-72. The only evidence of the value of the goods taken in the case before us was the testimony of a Sears employee that the total selling price of the coats was \$814.98. The witness testified that he was unsure how much Sears actually paid for the coats, and estimated that there had been about a thirty-five percent markup on the coats.

[2] Defendant argues that "value" for purposes of G.S. § 14-72 means "fair market value" and not "selling price" as testified to by the Sears employee. Defendant cites *State v. Rick*, 54 N.C. App. 104, 282 S.E. 2d 497 (1981) and *State v. Haney*, 28 N.C. App. 222, 220 S.E. 2d 371 (1975) in support of his argument. *Rick* and *Haney* are distinguishable from the case before us. In both of those cases, the victim of the larceny was a private consumer, who estimated the value of the item taken in terms of the amount of money for which he or she would have been willing to sell the item. The court in both of those cases held that "selling price" was not competent evidence of "value" for purposes of G.S. § 14-72. We hold, however, that where a merchant has determined a retail price of merchandise which he is willing to accept as the worth of the item offered for sale, such a price constitutes evidence of fair market value sufficient to survive a motion to dismiss. See *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982); *State v. Boone*, 39 N.C. App. 218, 249 S.E. 2d 817 (1978), modified on other grounds, 297 N.C. 652, 256 S.E. 2d 683 (1979), where price tags on retail consumer merchandise were admitted as evidence of the value of a stolen item.

[3] In defendant's third assignment of error, he contends that the trial judge erred in failing to instruct the jury that defendant could not be convicted both of larceny of the coats and of possession of the same coats. While a defendant may be indicted and tried both for larceny and possession of the same stolen goods, he may not be convicted of both offenses, *State v. Perry*, supra. Even without a request from a defendant, a trial judge should instruct the jury that it may convict the defendant of either but not both charges. While it is clear that the trial judge in this case erred in refusing to so instruct the jury, in the case before us, the jury cured the trial judge's error by convicting defendant of only the possession charge. Defendant's assignment of error is overruled.

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[4] Finally, defendant argues that the trial judge erred in considering defendant's prior convictions as a factor in aggravation during the sentencing phase of the trial. Defendant argues that where the state relies on prior convictions as a factor in aggravation for sentencing purposes, the burden is on the state to show either (1) defendant was not indigent at the time of the convictions or (2) if indigent, defendant was represented by counsel. This argument has been rejected by our supreme court in *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), where the court held that, the burden is on the defendant to show to the trial court that his prior conviction may not be considered for the reasons defendant relies on. This assignment is overruled.

No error.

Chief Judge VAUGHN and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. SUPORA WELDON

No. 8310SC204

(Filed 6 December 1983)

1. Criminal Law § 34.8; Narcotics § 3.1— evidence that heroin found in house on two other occasions properly admitted

In a prosecution for trafficking in heroin, the trial court properly admitted testimony that police had found heroin in or near defendant's house on two other occasions since the evidence was relevant to show defendant's "guilty knowledge" of the presence and the character of the drugs found. G.S. 90-95.

2. Narcotics § 3.1— testimony of house's drug reputation—properly admitted

In a prosecution for trafficking in heroin, the trial court properly admitted testimony that defendant's house had a reputation of being a site of illegal sale and use since the evidence tended to show defendant's knowledge and intent at the time of the offense.

APPEAL by defendant from *Braswell, Judge*. Judgment entered 3 August 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 25 October 1983.

On 8 February 1982 Officers Pollard and Benafield of the Raleigh police department knocked on the front door of a house

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owned by Bill Moody, Jr. and leased to defendant. After there was no answer the officers identified themselves and kicked the door open. The officers frisked two black males who were in the living room area and then gave a copy of a search warrant to defendant, who was also present. While searching the house, the officers discovered 30 bindles of heroin. Defendant was then placed under arrest. She was searched, and \$449 was found on her person.

Raleigh police officers had earlier searched defendant's house pursuant to a search warrant on 9 December 1981. During that search nine bags of heroin were discovered under a sofa while defendant was present. Two bags of marijuana, a needle and syringe, and \$648 were found on the living room table in front of defendant.

On 30 May 1982 officers returned to the house to conduct another search. During that search, police found a plastic bread wrapper containing bindles of heroin under a trash container about five feet from the rear door of the house. In addition, \$201 was found on defendant's person. Officers who participated in the two searches testified at trial that defendant's house had the reputation of being a place where heroin and other illegal drugs could be bought or sold.

Defendant was convicted of trafficking in heroin and was sentenced to 14 years in prison. From that verdict she appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Lorinzo L. Joyner for defendant-appellant.

ARNOLD, Judge.

[1] Defendant's first contention is that the trial court erred in allowing testimony that police found heroin in or near her house on two other occasions. She alleges that the evidence was irrelevant, except to show her propensity to commit the offense of felonious possession of heroin. Under the general rule, evidence of other offenses, even those which are of the same nature as the one charged, is inadmissible to prove the commission of the particular crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). In drug cases, however, "evidence of other drug viola-

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tions is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found." *State v. Richardson*, 36 N.C. App. 373, 375, 243 S.E. 2d 918, 919 (1978).

Defendant was charged with violation of G.S. 90-95 which makes it unlawful for any person "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." The evidence complained of was expressly offered by the State to show defendant's "guilty knowledge" of the presence and character of the drugs found during the February 1982 search. It was, therefore, properly admitted.

Defendant cites *State v. Little*, 27 N.C. App. 211, 218 S.E. 2d 486 (1975), to support her contention that the other discoveries of heroin were irrelevant on the question of her knowledge of the presence of heroin during the February 1982 search. In *Little*, the court found no "logical relevancy" where heroin was discovered at the defendant's apartment seven months after he had been charged with possession of heroin. The second discovery, the court said, amounted to no more than "evidence of an offense of the 'same nature.'" 27 N.C. App. at 213, 218 S.E. 2d at 488. It did not tend to establish the mental state or guilty knowledge of the defendant seven months prior. *Id.*

In the case at bar, however, the evidence of the other discoveries does tend to show defendant's guilty knowledge. Defendant leased and lived in the house where heroin was found, and she was physically present on the occasion of each search. During the first search, which occurred two months prior to the offense charged, heroin, a needle and syringe, and \$648 were found on a table directly in front of defendant. During the last search, which took place three months after the offense, heroin was found at an easily accessible location about five feet from defendant's back door, and \$201 was found on her person. We find that the evidence of the two separate discoveries of heroin at defendant's house, one occurring two months before the offense charged and the other occurring three months afterward, during which sizeable amounts of money were also found, is admissible to show defendant's knowledge of the presence and character of the drugs found during the search of her house on 9 February 1982.

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[2] Defendant next contends that the court erred in admitting testimony that her house had the reputation of being a site of illegal drug sale and use. Although this evidence would ordinarily be considered hearsay, this Court has held that evidence concerning the reputation of a place or neighborhood is admissible where it goes to show the intent of the person charged. *State v. Lee*, 51 N.C. App. 344, 276 S.E. 2d 501 (1981). We find that this evidence was, therefore, admissible to show defendant's knowledge and intent at the time of the offense.

Finally, defendant contends that she was improperly cross-examined about prior convictions of liquor violations and about her financial status. We note that the evidence complained of was received without objection from defendant and is now being challenged for the first time on appeal. Defendant has, therefore, waived her right to object to the cross-examination at trial. *State v. Wilkins*, 297 N.C. 237, 254 S.E. 2d 598 (1979).

No error.

Judges HILL and EAGLES concur.

IDA S. DAVIS v. CORNING GLASS WORKS AND EMPLOYMENT SECURITY
COMMISSION OF NORTH CAROLINA

No. 8210SC1176

(Filed 6 December 1983)

**Master and Servant § 108.1— unemployment compensation—misconduct connected
with work—violation of employer's attendance rules**

An employee was discharged for misconduct connected with her work for deliberately violating the employer's attendance rules and was thus not entitled to unemployment benefits where the employee was on probation due to absenteeism and tardiness before going on a medical leave of absence; the employee knew of the employer's reasonable policy that medical leaves of absence could be granted or extended only upon the request of the employee's physician; the employee's doctor certified that the employee would be able to return to work on 1 December, and the employer ordered her to return to work on that date; the employee did not return to work until 2 December; and the employee failed to have her medical leave extended or her absence on 1 December excused by a statement from her attending physician.

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APPEAL by claimant from *Battle, Judge*. Order entered 21 June 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 28 September 1983.

Claimant-employee appeals from the judgment of the superior court which affirmed the Employment Security Commission's decision to disqualify claimant from receiving unemployment benefits because she was discharged for misconduct connected with her work.

East Central Community Legal Services, by Victor J. Boone, for claimant appellant.

Donald R. Teeter, for Employment Security Commission of North Carolina, appellee.

Bailey, Dixon, Wooten, McDonald & Fountain, by John N. Fountain and Gary K. Joyner, for Corning Glass Works, appellee.

BECTON, Judge.

I

Employer, Corning Glass Works (Corning), granted claimant, Ida Davis, a medical leave of absence for toe surgery effective 2 July 1980. During the leave, Davis received disability benefits.

Corning realized in early October that Davis was attending classes at a local university under Corning's reimbursement employee program. Corning felt that Davis could return to work if she could attend classes, since her job required her to sit 97% of the time. The company doctor confirmed that the operation should not have required such a long convalescence. After Davis had been examined by the company doctor, Corning, in a letter, ordered Davis to report to work on 29 October 1980 "or you will no longer be considered an employee of Corning Glass Works." Davis's personal physician, Dr. Ayers, notified Corning on 28 October 1980 that a recent x-ray showed the need for further surgery. Davis's leave was extended.

At the end of November, Ayers certified to Corning that Davis would be able to return to work on 1 December 1980. In a letter dated 26 November 1980, Corning ordered Davis to return to work on 1 December 1980 at 7:00 a.m. Corning warned her that her disability benefits would be terminated as of that date. Davis

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did not return to work on 1 December 1980. Instead, she called the plant nurse at 9:05 a.m. According to the Employment Security Commission's (Commission) findings, Davis told the nurse "that she was unable to report to work because she had hit her foot on the leg of the coffee table the previous night and it was very sore; that she would return to work on the following day if it felt better." When Davis reported for work on 2 December 1980, she was informed that she had been terminated effective 1 December 1980. Davis did not present a doctor's excuse on 2 December 1980 or at any time thereafter.

Davis's work record, prior to the medical leave of absence, had been marked by chronic absenteeism and tardiness. Shortly before the leave, on 5 May 1980, Davis was suspended for three days, the second of three steps in Corning's absenteeism program. The absenteeism program came into play when an employee had more than three unexcused absences within a ninety-day period. With each additional violation, the employee took another step towards termination. Davis's suspension, the second step, was the final warning. Termination, the third and final step, would automatically result with the next violation. Thus, Davis left on her medical leave of absence just one step short of termination.

II

Davis's sole exception and assignment of error relates to the Commission's conclusion that Davis was disqualified from unemployment benefits because she had been discharged for misconduct connected with her work. Since the superior court simply affirmed the Commission's decision, we will refer to the Commission's findings and conclusions.

We note that Davis failed to except to the Commission's findings of fact. "When no exceptions are made to the findings of fact, they are presumed to be supported by competent evidence and are binding on appeal." *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 653, 292 S.E. 2d 159, 161 (1982). As the reviewing Court, we are left to determine whether the findings of fact support the Commission's conclusion and its resulting decision. *State ex rel. Employment Security Comm'n v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950).

The Commission shall disqualify a claimant for benefits if it determines that she was discharged from employment for miscon-

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duct connected with her work. N.C. Gen. Stat. § 96-14(2) (1981). The General Assembly had not defined misconduct within the context of the statute at the time claimant was disqualified. Recently, our Supreme Court approved the rule recognized by this Court and the majority of other jurisdictions. See *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982).

[T]he term 'misconduct' [in connection with one's work] is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. . . .

In re Collingsworth, 17 N.C. App. 340, 343, 194 S.E. 2d 210, 212 (1973) (quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259, 296 N.W. 636, 640 (1941)). Effective 1 August 1983, the General Assembly codified the *Collingsworth* rule at N.C. Gen. Stat. § 96-14(2) (Supp. 1983).

Under the *Collingsworth* rule, "misconduct" encompasses an employee's deliberate violations of her employer's reasonable attendance rules as well as her failure to give her employer proper notice of absences. *Butler v. J. P. Stevens & Co., Inc.*, 60 N.C. App. 563, 299 S.E. 2d 672, *disc. rev. denied*, 308 N.C. 191, 302 S.E. 2d 242 (1983); see Annot., 58 A.L.R. 3d 674, 685 (1974). In the case before us, the Commission made the following pertinent findings of fact:

2. Prior to the claimant's going on leave, she was *on probation* due to absence from work and tardiness in reporting to work.
3. The employer has a *known, reasonable policy* that provides that medical leaves of absence can be granted or extended only upon the request of the employee's physician. *The claimant was aware of this policy.*

. . .

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7. When the claimant reported to work at the usual time on December 2, 1980, . . . she did not present a doctor's excuse for the previous day's absence, or to extend the leave of absence. The plant nurse has no authority to either grant or extend a medical leave of absence, nor did the nurse purport to excuse the claimant's absence on December 1, 1980.
8. At Corning Glass, a doctor's statement is the basis for approval or disapproval or an employee's absence for alleged illness or disability. [Emphasis added.]

From these findings the Commission could reasonably conclude that Davis deliberately violated Corning's attendance rules by failing to report for scheduled work at the end of a medical absence, or, in the alternative, by failing to have the leave extended, or the absence excused, by a statement from her attending physician. In this instance, Davis's deliberate violations triggered the third and final step in Corning's absenteeism program—termination. Therefore, we hold that the Commission's findings support its conclusion that Davis had been discharged for "misconduct connected with her work."

On these facts, the Commission's decision to disqualify Davis for unemployment benefits was appropriate. The superior court did not err in affirming the Commission's decision.

Affirmed.

Judges JOHNSON and BRASWELL concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY WILLIAMS

No. 839SC18

(Filed 6 December 1983)

Criminal Law § 86.4— prosecution for feloniously breaking and entering—evidence of other crimes—properly admitted to impeach defendant

In a prosecution for feloniously breaking and entering, the trial court properly allowed cross-examination of defendant concerning three other break-ins and testimony concerning those break-ins since (1) the State had a right to

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test the validity of defendant's defense that he had no knowledge of the break-in for which he was being tried because he had passed out, and (2) when defendant took the stand he was subject to having his credibility impeached by good faith questions about specific acts of criminal and degrading conduct.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 11 August 1982 in Superior Court, VANCE County. Heard in the Court of Appeals 26 September 1983.

Defendant and two companions—J. C. Edwards and Charles Puckett—were charged with feloniously breaking and entering four different buildings during the night of 28 March 1982. The places allegedly broken in were the Medical Arts Pharmacy and the office of Dr. Reddy, both situated in the same building in Henderson, and two cabins situated at nearby Kerr Lake. Upon defendant's motion the charges were severed and he was tried for breaking in the Medical Arts Pharmacy, found guilty, and a three-year prison term was imposed.

The State's evidence, largely through the testimony of Edwards, who turned State's evidence, tended to show that: The three of them on the night involved, after riding around Henderson for a while in Puckett's pickup truck, stopped behind the Medical Arts Building and Edwards took a tire jack and knocked the glass out of a window to Dr. Reddy's office, but nobody entered the office at that time. They then drove to Kerr Lake and after Edwards broke into the first cabin, all three entered the second cabin, which was next door, after which they returned to the Medical Arts Building, entered Dr. Reddy's office and removed some drugs from it. They then rode around town some more before again returning to the Medical Arts Building, where Puckett broke into the pharmacy while the other two waited in the truck. After Puckett returned to the truck empty handed, all three then went in the pharmacy, where they filled a trash can with drugs, syringes and other articles, including a prescription pad and a dating stamp, and left.

In testifying upon his own behalf defendant admitted being with the other two the night involved, but claimed he passed out earlier in the evening from overindulging in drugs and alcohol, and neither participated in the crimes nor even knew when they were committed. On cross-examination, over defendant's objection, the District Attorney questioned him about the other three

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break-ins and asked if a television set was stolen from one of the cabins and hidden in a shed behind his house.

On rebuttal Puckett, who also turned State's evidence, corroborated Edwards' version of their night of crime and also testified that a television set was stolen from one of the cabins and placed in a shed behind defendant's house.

Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Edmundson & Catherwood, by John W. Watson, Jr. and Robert K. Catherwood, for defendant appellant.

PHILLIPS, Judge.

All four of defendant's assignments of error relate to the other three break-ins that he was not being tried for being called to the jury's attention by one means or another. Though each assignment is treated separately in the brief, they really support but two contentions of prejudicial error; the first of which was permitting the State's witnesses to testify about defendant's participation in the other three crimes, and the second was permitting the State to cross-examine defendant about the other break-ins and their aftermath. In our opinion, it was not error to do either.

Evidence by the State that an accused has committed other crimes is not necessarily inadmissible. Like other circumstantial evidence that benefits one party's case and detrimentally affects that of the other, evidence of other crimes offered by the State is admissible if it tends to prove any other relevant fact in the case; but if the only effect of such evidence is to show that the defendant is a bad person with a criminal disposition, it is not admissible. 1 Brandis, N.C. Evidence § 91 (2d ed. 1982). The evidence of defendant's participation in the three other break-ins that occurred that same night tended to prove several relevant facts in the case against him, and was therefore properly received. Among other things, the evidence tended to show defendant's knowledge of the crime he was tried for and his intent to commit it; it also tended to prove that the pharmacy break-in was part of an ongoing, continuing scheme to pillage and rob. The several decisions relied upon by defendant have no application; the other

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crimes in those cases occurred at other times and places and had no connection with the crime charged.

Under the peculiar circumstances of this case, cross-examining defendant about the other crimes was proper for two reasons. First, under our law the right to cross-examine one's adversary or his witnesses about what he has testified to in the case is fundamental in criminal and civil cases alike. 1 Brandis, N.C. Evidence § 35 (2d ed. 1982). Since the defendant had taken the stand and testified that he had no knowledge of the pharmacy break-in because he passed out early in the evening, the State had a right to test the validity of that defense by cross-examining him about his activities during the period of alleged oblivion—which, no doubt, was the main reason he was questioned about the other crimes and the stolen television. Second, when defendant took the stand he occupied the same position as any other witness and under our law every witness is subject to having his credibility impeached by good faith questions about specific acts of criminal and degrading conduct. *State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981); 1 Brandis, N.C. Evidence §§ 111, 112 (2d ed. 1982). The defendant's heavy reliance upon *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954) is misplaced. There, the questions were of dubious foundation and were about people and events that had no connection with the case. Here, however, the inquiries were apparently in good faith and concerned similar crimes that occurred that same night. That the good faith basis for the State's questions about the stolen television being kept at defendant's place was not revealed until rebuttal is of no consequence. Good faith for impeaching cross-examination does not have to be established ahead of time, it only has to exist—*State v. Leonard*, 300 N.C. 223, 266 S.E. 2d 631, cert. denied, 449 U.S. 960, 66 L.Ed. 2d 227, 101 S.Ct. 372 (1980)—unless the court in its discretion determines that a *voir dire* is appropriate. *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970).

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

Barclays American v. Haywood

BARCLAYS AMERICAN FINANCIAL, INC. v. CONRAD HAYWOOD AND
GENEVA HAYWOOD

No. 8229DC1243

(Filed 6 December 1983)

Husband and Wife § 3; Rules of Civil Procedure § 36— action against spouses—admissions by husband not binding on wife

In an action to recover on a note allegedly signed by defendant spouses, failure of defendant husband to respond in apt time to interrogatories and requests for admissions addressed only to him constituted admissions of fact by him under G.S. 1A-1, Rule 36(a) which justified the entry of summary judgment against him, but such admissions were not binding on defendant wife where there was no evidence that the husband was authorized to act as the wife's agent.

APPEAL by defendant from *Greenlee, Judge*. Judgment entered 1 July 1982 in District Court, RUTHERFORD County. Heard in the Court of Appeals 20 October 1983.

Plaintiff brought this action to recover a debt owed by defendants, spouses, Conrad and Geneva Haywood. The trial court granted plaintiff's motion for Summary Judgment and defendant, Geneva Haywood, appeals on the basis that admissions by her husband are not binding as to herself.

The pertinent facts are as follows:

Plaintiff instituted action on 20 November 1981 against defendants, Conrad and Geneva Haywood, to recover \$744.50 plus interest due on a Promissory Note allegedly signed by both defendants. On 2 December 1981, both defendants filed an Answer denying execution of the said Note. On 21 January 1982, plaintiff served eleven Interrogatories, addressed to defendant, Conrad Haywood. On 27 April 1982, when defendant had not yet answered plaintiff's Interrogatories, plaintiff served thirteen Requests for Admissions of Fact, again addressed to defendant, Conrad Haywood. On 8 June 1982, when defendant had not yet responded to plaintiff's Requests, plaintiff moved for Summary Judgment against both defendants based on admissions of fact deemed to have been made by defendant, Conrad Haywood's failure to respond. On 21 June 1982, defendant, Conrad Haywood, filed Answers both to the Interrogatories and to the Requests for Admissions. In his Answers, he admitted signing plaintiff's Prom-

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issory Note, but denied that his wife, Geneva Haywood, had signed. On 23 June 1982, plaintiff moved to dismiss defendant's Answer to plaintiff's Requests for Admissions of Fact because such Answer was filed too late under Rule 36(a) of the North Carolina Rules of Civil Procedure.

On 1 July 1982, the Court dismissed defendant's Answers to the Requests for Admissions and concluded that by virtue of defendants' failure to timely answer said Requests, they were liable to plaintiff for \$744.50 plus interest thereon at a rate of 23.814% from 11 November 1981, plus costs. There being no genuine issue of material fact, the Court granted Summary Judgment against both defendants. Defendant, Geneva Haywood, appeals.

No brief for plaintiff appellee.

J. H. Burwell, Jr., for the defendant appellant.

VAUGHN, Chief Judge.

Defendant's sole contention on appeal is that the trial court erred by granting Summary Judgment against her, based on the deemed admissions of her husband and co-defendant. We agree with defendant.

Pursuant to Rule 36(a) of the North Carolina Rules of Civil Procedure, upon plaintiff's serving defendant with written requests for admissions, the matters contained in such requests are deemed admitted unless answered or objected to by defendant within the requisite time, i.e., thirty days. In the case, *sub judice*, on 26 April 1982, plaintiff served defendant, Conrad Haywood, but not defendant, Geneva Haywood, with Requests for Admissions. Plaintiff's Requests, in essence, asked defendant to admit or deny that Conrad Haywood had signed the Promissory Note to plaintiff; that Geneva Haywood had signed said Note; that the amount due plaintiff was \$744.50; that no monthly payments had been made from 24 March 1981 to present; and that said Note was supposed to have been paid by 24 March 1981.

Defendant Conrad Haywood's failure to answer or object to plaintiff's Requests within the requisite time was an admission by him under G.S. 1A-1, Rule 36(a). The effect of such admission conclusively established defendant, Conrad Haywood's liability to

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plaintiff. G.S. 1A-1, Rule 36(b). Summary Judgment against defendant, Conrad Haywood, was proper on these facts. See *Overnite Transportation v. Styer*, 57 N.C. App. 146, 291 S.E. 2d 179 (1982); *Shreve v. Combs*, 54 N.C. App. 18, 282 S.E. 2d 568 (1981).

Summary Judgment should not, however, have been granted against defendant, Geneva Haywood, since there were material issues of disputed facts regarding her liability on the Note. The only facts in evidence pertaining to her liability were contained in the pleadings and in plaintiff's Exhibit A, a copy of the said Note. Plaintiff claimed in its Complaint that defendants had executed a Promissory Note to plaintiff for valuable consideration, that defendants had defaulted on said Note, and that the entire outstanding balance due plaintiff was \$744.50. Had defendant, Geneva Haywood, admitted the truth of these charges, Summary Judgment would have been proper. Defendants, however, in their Answer to the Complaint, denied all of these charges. Plaintiff made no further discovery to determine defendant, Geneva Haywood's liability. Its Interrogatories and Requests for Admissions of Fact were served on Conrad, not Geneva Haywood.

Although Conrad Haywood's failure to answer or object in time to plaintiff's Requests for Admissions of Fact constituted admissions of fact by him, they did not bind his wife and co-defendant, Geneva Haywood. Facts admitted by one defendant are not binding on a co-defendant. *Community Bank of Hayti v. Midwest Steel Erection, Inc.*, 24 Fed. R. Serv. 2d 428 (D.S.D. 1977); *United States v. Wheeler*, 161 F. Supp. 193 (W.D. Ark. 1958). Furthermore, that the co-defendants were married does not create any presumption or proof that Conrad Haywood was his wife's agent. *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828 (1954); *Zickgraf Hardwood Co. v. Seay*, 60 N.C. App. 128, 298 S.E. 2d 208 (1982). Plaintiff presented no evidence that Conrad Haywood was authorized to act as his wife's agent. Although only slight evidence of agency is required when the wife receives, retains and enjoys the benefits of a contract, plaintiff presented no evidence that Geneva Haywood had received any such benefits. See *Norburn v. Mackie*, 262 N.C. 16, 136 S.E. 2d 279 (1964); *Zickgraf Hardwood Co., supra*.

Since there were material issues of fact regarding Geneva Haywood's liability on the said Note, Summary Judgment as to Geneva Haywood must be and is reversed.

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Reversed.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. VAN PRINCE WELCH

No. 834SC313

(Filed 6 December 1983)

1. Criminal Law § 66.14— independent origin of in-court identification

The trial court properly found that two witnesses' in-court identifications of defendant were based on observations independent of the photographic identifications where the evidence tended to show that defendant had been in the store on a prior occasion; the witnesses had observed defendant for about fifteen minutes on the day of the robbery; defendant stood about four feet away from them, and escorted them physically to a bathroom; the store was well lighted; both witnesses gave accurate descriptions of defendant to the police; both witnesses viewed numerous pictures in the days following the robbery without identifying defendant; and about a month after the crime a police officer showed the witnesses a single photograph of defendant which both witnesses immediately recognized as the photograph of the perpetrator of the robbery.

2. Criminal Law § 15— denial of motion for change of venue—no error

Defendant failed to show an abuse of discretion on the part of the trial court in denying his motion for change of venue where the record contained no indication that defendant used any of his challenges or that pre-trial publicity affected any juror adversely.

3. Criminal Law § 101.2— exposure by juror to newspaper article about defendant—denial of motion for mistrial proper

The trial court did not err in denying defendant's motions for a mistrial and to set aside the verdict on the ground that during the trial a juror had read a newspaper article about another crime which defendant had committed where the court found that the juror who had read the article was in no way influenced by it, and that the verdict resulted from deliberation on "the evidence and other matters coming solely from [the] courtroom and from no other source."

4. Criminal Law § 99.4— denying motion to dismiss in presence of jury—no expression of opinion by court

Defendant failed to show that the court expressed an opinion, in violation of G.S. 15A-1222, by summarily denying his motion to dismiss in the presence of the jury since the record failed to show that the ruling was in fact audible to the jurors, since the defendant did not object or move for a mistrial on this

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count at trial, and since at most, the ruling merely informed the jury that the evidence was sufficient to allow it to decide the case.

ON writ of certiorari to review judgment entered by *Stevens, Judge*. Judgment entered 26 October 1978 in Superior Court, ONSLOW County. Certiorari allowed by the Court of Appeals 15 December 1982. Heard in the Court of Appeals 16 November 1983.

Defendant appeals from a judgment of imprisonment entered upon his conviction of common law robbery.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying his motion to suppress the identification testimony of two employees of the store allegedly robbed.

The court found as facts the following:

Defendant had been in the store on a prior occasion, and the witnesses had observed him for about fifteen minutes on the date of the robbery. Defendant stood about four feet away from them, and escorted them physically to a bathroom. The store was well lighted. Both witnesses viewed numerous pictures in the days following the robbery without identifying defendant. Both gave accurate descriptions of defendant to the police. About a month after the crime a police officer showed the witnesses a single photograph of defendant. Both immediately recognized it as a photograph of the perpetrator of the robbery. Both identified defendant positively at trial and testified that their identification was based on their recollection of events at the time of the robbery.

Defendant argues that the single photograph tainted the in-court identification, and that the court thus should have suppressed the identification testimony. Use of a single photograph, however, does not *per se* render identification procedures imper-

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missibly suggestive. *Manson v. Brathwaite*, 432 U.S. 98, 109-14, 53 L.Ed. 2d 140, 151-54, 97 S.Ct. 2243, 2250-53 (1977); see *State v. Snowden*, 51 N.C. App. 511, 513-14, 277 S.E. 2d 105, 107, *disc. rev. denied*, 303 N.C. 318, 281 S.E. 2d 657 (1981); see also Annot., 39 A.L.R. 3d 1000, 1013-15 (1971 & Supp. 1983). Even if the procedure used could be found impermissibly suggestive, the identification testimony is admissible if the in-court identification had an independent origin. *Manson, supra*; *State v. Thompson*, 303 N.C. 169, 172, 277 S.E. 2d 431, 434 (1981).

The findings of fact on *voir dire* are supported by competent evidence, and are thus conclusive on appeal. See *State v. Hunter*, 26 N.C. App. 489, 490, 216 S.E. 2d 420, 421, *cert. denied*, 288 N.C. 246, 217 S.E. 2d 671 (1975). They amply support the conclusion that the witnesses identified defendant based on observations independent of the photographic identification. This contention is thus without merit.

[2] Defendant contends the court erred in denying his motion for a change of venue. The motion was "addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error." *State v. Harrill*, 289 N.C. 186, 190, 221 S.E. 2d 325, 328, *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3212 (1976). The record contains no indication that defendant used any of his challenges or that pre-trial publicity, the basis of his motion, affected any juror adversely to defendant. Under these circumstances no abuse of discretion in denial of the motion appears.

[3] Defendant contends the court erred in denying his motions for a mistrial and to set aside the verdict on the ground that during the trial a juror had read a newspaper article about another crime which defendant had committed. Defendant, upon learning of this, initially requested a mistrial or an examination of the jurors as to whether any of them had seen the article. The court denied a mistrial, but noted that it would allow examination of the jurors if they found defendant guilty.

Upon examination subsequent to the verdict one juror indicated that he or she had read "a couple of paragraphs" about defendant in a newspaper, and that the article did say something about previous convictions. The juror testified that the article did not in any way affect his or her verdict.

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That juror had told one other juror about reading an article regarding defendant. The other juror indicated that he or she had only been told that the article was about defendant. All jurors indicated that their deliberations and verdict were based solely and entirely on the evidence, the arguments of counsel, and the charge of the court.

The court found that the juror who had read the article was in no way influenced by it, and that the verdict resulted from deliberation on "the evidence and other matters coming solely from [the] courtroom and from no other source." It found exposure to the article, but no prejudice therefrom.

The problem [of exposure of jurors to news media reports during trial] is primarily one for the trial judge, who must weigh all the circumstances in determining in his sound judicial discretion whether the defendant's right to a fair trial has been violated when information or evidence reaches the jury which would not be admissible at trial.

State v. Jones, 50 N.C. App. 263, 268, 273 S.E. 2d 327, 331, *disc. rev. denied*, 302 N.C. 400, 279 S.E. 2d 354 (1981); *see also United States v. Pisano*, 193 F. 2d 355 (7th Cir. 1951) (five jurors read "misleading" article during trial; jurors' affirmations, after questioning, of no influence sufficient to allow court to proceed with trial); *State v. Trivette*, 25 N.C. App. 266, 212 S.E. 2d 705 (1975) (proper to proceed upon jurors' affirmations, after diligent questioning, of no influence). As in *Jones*, the court here "was justified in concluding that [the jurors] had not formed an opinion as a result of . . . the article and that they [made] a decision based solely on the evidence presented at trial." *Jones, supra*, 50 N.C. App. at 268, 273 S.E. 2d at 331. We find no error or abuse of discretion in the denial of the motions for mistrial and to set aside the verdict.

[4] Defendant finally contends the court expressed an opinion, in violation of G.S. 15A-1222, by summarily denying his motion to dismiss in the presence of the jury. The record, however, does not affirmatively disclose that the ruling was in fact audible to the jurors. Defendant did not seek to have the ruling made out of the presence of the jury, nor did he object or move for mistrial on this account at trial. Generally, ordinary rulings by the court in the course of trial do not amount to an impermissible expression

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of opinion. *State v. Gooche*, 58 N.C. App. 582, 586-87, 294 S.E. 2d 13, 15-16, *modified on other grounds*, 307 N.C. 253, 297 S.E. 2d 599 (1982). At most the ruling here merely informed the jury that the evidence was sufficient to allow it to decide the case. On this record no prejudice to defendant appears.

No error.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. DAVID WAYNE BENNETT

No. 8321SC300

(Filed 6 December 1983)

1. Searches and Seizures § 11— warrantless search of vehicle—probable cause

A search of defendant's automobile and the seizure of stolen property found therein were valid under the automobile exception to the Fourth Amendment where an officer stopped defendant for driving under the influence and noticed a bank deposit bag in plain view on the floor of the car behind the driver's seat with papers in it bearing the name of a break-in victim, since the officer then had probable cause to believe other contraband from the break-in might be concealed within the vehicle and thus had probable cause to conduct a search and seizure of anything in the vehicle.

2. Receiving Stolen Goods § 6— possession of stolen goods—sufficiency of instructions

The trial court's instructions on the elements of possession of stolen goods were sufficient where the court adequately instructed on the elements of felonious possession of stolen goods pursuant to a breaking and entering with the exception of failing to give a precise definition of breaking and entering, the jury asked for a clarification on the distinction between felonious and nonfelonious possession of stolen goods, and the trial court at that time correctly defined breaking and entering for the jury.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 17 November 1982 in the Superior Court of FORSYTH County. Heard in the Court of Appeals 15 November 1983.

The defendant was charged with felonious possession of stolen goods in violation of G.S. 14.71.1. From the jury's verdict of guilty, defendant appeals.

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Attorney General Rufus L. Edmisten by Assistant Attorney General Elaine J. Guth for the State.

Mallory M. Barber and L. G. Gordon, Jr., for defendant appellant.

HILL, Judge.

Evidence for the State tended to show the following: On 13 August 1982 and 20 August 1982, the S & R Motor Company was broken into, and several items of personal property belonging to Melvin Swisher, Vice-President, were taken therefrom. These items included a Wachovia bank deposit bag, a twenty-two caliber rifle, and some credit cards. Around midnight of 20 August 1982 a Kernersville police officer saw the defendant and his girlfriend walking in front of the S & R Motor Company. The next day, after learning of the break-in, the police officer saw defendant late at night and asked him if he knew anything about the break-in. Defendant responded that he might know and agreed to meet the police officer at the Food Town parking lot later that night. The defendant did not meet the officer at the scheduled time.

Two days later at approximately midnight another Kernersville police officer, who was aware of the foregoing conversation between the defendant and the first police officer, stopped a burgundy colored LeMans driven by the defendant and accompanied by his girlfriend. After giving defendant some performance tests, the officer arrested the defendant for driving under the influence and gave him his *Miranda* rights. During this activity the police officer noticed a Wachovia bank deposit bag on the floor of the car behind the driver's seat with papers in it having the name of "Swisher" on them. Knowing of the break-in at S & R Motor Company, the police officer took possession of the bank bag, began searching the car, and discovered more items. Because the light was poor, he had the automobile towed to the police station where a thorough inventory was taken. Several items reported missing from the S & R Motor Company break-ins were found, including Swisher's credit cards and a twenty-two caliber rifle.

Defendant's testimony tended to raise the defense of entrapment.

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[1] By his first assignment of error defendant argues the warrantless search of his automobile was unconstitutional because of the lack of probable cause and because the search was not incident to arrest. Based upon these contentions, defendant argues the trial judge erred in denying his motions to suppress the evidence obtained and thereafter denying his motions to dismiss. In a "branch of law [that] is something less than a seamless web," *Cady v. Dombrowski*, 413 U.S. 433, 440, 93 S.Ct. 2523, 2527, 37 L.Ed. 2d 706, 714 (1973), we hold the search was valid under the automobile exception to the Fourth Amendment constitutional requirement that a warrant is needed in order to conduct a valid search.

Because of an automobile's mobility and inherent openness presenting much of its contents to plain view, United States Supreme Court cases consistently recognize an exception to the warrant requirement for automobile searches based on probable cause. The Supreme Court has extended the automobile exception by ruling that if a police officer has probable cause to search a lawfully stopped vehicle, the probable cause can justify a search of the entire car and anything found inside that may conceal the object of the search. *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed. 2d 572 (1982); see also Note, *Search and Seizure—Warrantless Container Searches Under the Automobile and Search Incident to Arrest Exceptions—United States v. Ross*, 18 Wake Forest L. Rev. 1145 (1982).

In the case under review, the officer testified he knew of the break-ins at the S & R Motor Company at the time he stopped the car. He looked into the car and saw in plain view on the floorboard behind the driver's seat the Wachovia bank deposit bag with papers bearing the name Melvin Swisher clearly marked thereon. Presence of the papers seen by the officer is sufficient probable cause to believe other contraband from the robbery may be concealed within the vehicle. Therefore, the officer had probable cause sufficient to conduct a search and seizure of anything in the vehicle, including items within the bag. See *United States v. Ross*, *supra*. Because the search in question falls within one of the "jealously and carefully drawn" exceptions to the warrant requirement of the Fourth Amendment, the search is constitutional regardless of whether or not it fails to qualify under another exception. We conclude the trial court committed no error in admit-

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ting the evidence and thereafter denying defendant's motion to dismiss.

[2] Nor do we find error by the trial court in its instructions to the jury regarding the elements of possession of stolen goods. The parties agreed prior to trial that the value of the goods in excess of \$400.00 would not be a factor for the jury. In the principal charge the court adequately instructed on the essential elements for felonious possession of stolen goods pursuant to a breaking and entering except to a precise definition for "breaking and entering." Approximately ten minutes later the jury came back asking for a clarification on the distinction between felonious and non-felonious possession of stolen goods, and at that time the judge correctly defined breaking and entering for the jury. He then asked the jury and defense counsel if anything further should be said by the court and received a negative reply. A trial court's instructions must be read contextually as a whole, and isolated erroneous portions will not be considered prejudicial error on appeal when the instruction read as a whole is correct. See *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970); *State v. McCall*, 31 N.C. App. 543, 230 S.E. 2d 195 (1976). When construed contextually as a whole, the charge is adequate. We conclude this assignment together with defendant's remaining assignments of error to be without merit.

No error.

Judges ARNOLD and BRASWELL concur.

ROBIE A. SWINK, EMPLOYEE, PLAINTIFF v. CONE MILLS, INC., EMPLOYER, AND
LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC408

(Filed 6 December 1983)

Master and Servant § 68—workers' compensation—occupational disease—insufficient findings on "significant contribution" to disease

In a workers' compensation action where plaintiff alleged disability from occupational chronic obstructive pulmonary disease, pursuant to *Rutledge v. Tultex Corp.*, 308 N.C. 85 (1983), the case must be remanded to the Industrial

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Commission for findings on the question of "significant contribution" to plaintiff's disabling chronic obstructive pulmonary disease.

ORDER dated 10 May 1983 entered by this Court allowing plaintiff's petition to rehear his appeal. Heard in the Court of Appeals 28 November 1983.

Plaintiff filed this claim under the Workers' Compensation Act alleging disability from occupational chronic obstructive pulmonary disease in August of 1978. Plaintiff's claim was denied by the Industrial Commission by Opinion and Award filed 6 February 1981. The denial of plaintiff's claim was affirmed by Opinion and Award by the Full Commission entered 25 November 1981. On appeal to this court a decision was entered affirming the Opinion and Award of the Full Commission and denying plaintiff's claim. Thereafter, plaintiff filed a Petition for Rehearing, which was allowed, and a subsequent order permitted the filing of new briefs.

Hassell and Hudson, by Charles R. Hassell, Jr., for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner and Kincheloe, by Philip R. Hedrick for defendants appellees.

HILL, Judge.

On 5 April 1983 this Court filed an opinion in which we affirmed the decision of the Industrial Commission holding the plaintiff had failed to show that his chronic pulmonary disease and disability were a result of his exposure to cotton dust in his employment with the defendant employer, and therefore, plaintiff had failed in his burden of proof that he was disabled as the result of an occupational disease. *Swink v. Cone Mills*, 61 N.C. App. 475, 300 S.E. 2d 848 (1983). The record relied on by this Court showed that plaintiff's expert witnesses were virtually unanimous in their testimony that plaintiff's cigarette smoking was a major causative factor in his chronic obstructive pulmonary disease; that in their opinion plaintiff's disease "could have" or may have been aggravated by exposure to cotton dust. The "mere possibility of causation" is not sufficient to establish an employee's disease as an occupational disease under the Workers'

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Compensation Act. *Walston v. Burlington Industries*, 304 N.C. 670, 679, 285 S.E. 2d 822, 828, as amended in 305 N.C. 296 (1982).

Subsequent to the filing of the *Swink* opinion, the Supreme Court rendered an opinion in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983), holding that an employee who suffers from chronic obstructive pulmonary disease is entitled to findings of fact and conclusions of law that said disease is an occupational disease pursuant to G.S. 97-53(13) if it is shown by competent evidence that occupational exposure to a hazard known to cause the disease, such as cotton dust, "significantly contributed" to the causation or development of the disease. The Court defined "significant" as "... having or likely to have influence or effect: deserving to be considered: important, weighty, notable." *Id.* at 101-102, 301 S.E. 2d at 370, quoting Webster's Third New International Dictionary (1971). The decision further stated:

Significant is to be contrasted with *negligible*, *unimportant*, *present but not worthy of note*, *miniscule*, or *of little moment*. The factual inquiry, in other words, should be whether the occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work.

Id. at 102, 301 S.E. 2d at 370. (Original emphasis.)

In addition to the significant contribution test announced in *Rutledge*, the Supreme Court outlined additional factors to be considered by the Industrial Commission in determining work-relatedness of a particular illness. The Court cited such factors as: (1) the extent of the worker's exposure to cotton dust during employment (in the case *sub judice* 38 years of employment during which time the worker's job included blowing off dust and lint with compressed air and mopping with a dry mop, such procedure producing between a peck and one-half bushel of dust and lint daily); (2) the extent of other non-work-related, but contributory exposures and components (in this case cigarette smoking and a history of tuberculosis); and (3) the manner in which the disease developed with reference to claimant's work history (as early as 1955 plaintiff began experiencing chest pains, choking, spitting up cotton lint and dust).

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At no time during the proceedings did plaintiff deny that his long history of cigarette smoking played a significant part in the development of his severe obstructive lung disease. With respect to the percentage of causation or assignment of relevant contribution, there was medical evidence on point in this case. With respect to aggravation or acceleration of an injury or disease brought about by occupational exposure, our Supreme Court has held that a disability caused by and resulting from a disease is compensable when ". . . the disease is an occupational disease, or is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment." *Walston v. Burlington Industries*, *supra* at 680, 285 S.E. 2d at 828, *as amended in* 305 N.C. 296, 297.

As the record reflects, there is uncontroverted testimony from plaintiff and his three medical witnesses that his 38 years of exposure to cotton dust, combined with his history of cigarette smoking and tuberculosis, probably contributed to his chronic bronchitis and chronic obstructive pulmonary disease, which has been rated as severe. There was further evidence that a probable connection by way of direct causation and/or aggravation existed between plaintiff's occupational exposure to cotton dust and his disabling chronic obstructive pulmonary disease.

We therefore reverse the order of the Commission and remand this case to the Industrial Commission for findings on the question of "significant contribution" and disposition in accordance with the premises set out herein. The decision rendered by this Court in this cause as set forth in 61 N.C. App. 475, 300 S.E. 2d 848 (1983) is superseded by our holding herein, and we withdraw that opinion.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

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NORMAN L. BALMER AND WIFE, CAROLYN A. BALMER v. MICHAEL L. NASH AND WIFE, ARLENE M. NASH

No. 8214SC1277

(Filed 6 December 1983)

1. Sales § 6; Vendor and Purchaser § 6— unsuitability of property for septic tank—no breach of implied warranty

The trial court properly denied plaintiffs' claim for breach of implied warranty in the sale of a lot because restrictive covenants limited use of the lot to residential purposes and a necessary septic tank system could not be approved for the property where the evidence showed that the fact that the lot was not suitable for a septic tank system was reasonably discoverable by plaintiffs in that they lived on an adjoining lot and knew the property was gullied and sloped, and plaintiffs could have asked the county health department to make a determination as to whether a septic tank system could be approved for the lot.

2. Cancellation and Rescission of Instruments § 4— lot sold for residential purposes—inability to support septic tank system—no mutual mistake

A sale of land was not subject to rescission on the ground of mutual mistake because restrictive covenants limited the use of the land to residential purposes, the land could not be used for such purposes because a septic tank system could not be approved for the land, and such fact was unknown to the grantors and grantees at the time of the conveyance.

PLAINTIFFS appeal from *Godwin, Judge*. Judgment entered 27 October 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 25 October 1983.

This action for rescission was brought against defendants for breach of an implied warranty and mutual mistake. The property which is the subject of this lawsuit is Lot No. 4 and the western portion of Lot No. 5 of the Chicopee Hills Subdivision located in Durham County. The property, which is gullied and sloped and which contains a wet weather creek, is subject to restrictive covenants limiting its use until the year 2000 to that of residential purposes only. In order for this property to be used for residential purposes under G.S. 130-160, it must have "an approved privy, an approved septic tank system or connection to a public or community sewage system." There presently is no public or community sewage system to which a residence on the property could be connected. Use of the property for residential purposes would, therefore, require an approved privy or an approved septic tank system.

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On 23 April 1973 defendant entered into a contract to purchase the property from Charles Woodall and wife. Defendants made their offer to purchase subject to "adequate percolation and approval of the Durham Health Inspector" and engaged the Durham County Health Department to test the property and determine whether a septic tank sewage system could be approved for the property. On 5 June 1973 the sanitation supervisor of the department notified defendants by letter that a septic tank system could be installed. Defendants did not construct a residence on the property, but moved from North Carolina to Georgia.

In August of 1977 plaintiffs, then the owners of a residence situated on an adjoining lot, bought the property. Before purchasing the property, plaintiffs were not aware of the 1973 letter from the Durham County sanitation supervisor. They had not sought the advice of the health department or anyone else as to whether an on-site sewage system could be approved for a dwelling constructed on the property, nor had they had conducted tests on the property to determine whether such a system could be approved.

Effective 1 July 1977, North Carolina state law was changed to the effect that a soil analysis test was substituted for percolation tests as the sole means of determining whether an on-site sewage system could be approved. Under the soil analysis test, a septic tank system could not be approved for the property.

On 14 August 1980, James M. Ross made an offer to purchase the property from plaintiffs. After being informed on 27 August 1980 by the Durham County Health Department that the property was unsuitable for the installation of a septic tank system, Ross withdrew his offer. Prior to this date, neither plaintiffs nor defendants were aware that such a system would not be approved for the property. Plaintiffs demanded that defendants refund the \$9,500 purchase price, and defendants refused. Plaintiffs then brought an action for rescission, with the result being judgment for defendants. From that judgment, plaintiffs appeal.

J. Kirk Osborn for plaintiff-appellants.

Spears, Barnes, Baker & Hoof, by Alexander H. Barnes, for defendant-appellees.

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ARNOLD, Judge.

[1] Plaintiffs contend that the trial court erred in denying their claim for breach of an implied warranty. They rely on the language of *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975), in which the court stated:

[W]here a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both unknown to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee, or by any subsequent grantee through mesne conveyance, for the specific purpose to which its use is limited by the restrictive covenants, the grantee breaches an implied warranty arising out of said restrictive covenants. 287 N.C. at 435, 215 S.E. 2d at 111.

For plaintiffs to prevail on the implied warranty question they must first show that the property cannot be used for residential purposes. We note that while it has been proven that the property will not support an approved septic tank system, and cannot be connected to an approved public or community sewage system, both permitted by G.S. 130-160 to indicate suitability for residential use, there has been no clear showing that a privy cannot be approved for the property.

Assuming, however, that a privy could not be approved, we find that plaintiffs have failed to show that the subsequent disclosure that the property is not suitable for a septic tank system, and the fact that there is no public system to which the property could be connected, were "both unknown to and not reasonably discoverable by them," as is required by *Hinson v. Jefferson*, *supra*. In fact, the record shows that these facts were reasonably discoverable by plaintiffs. Plaintiffs lived on a lot which adjoined the property and were, therefore, familiar with its topography. They knew that the property is gullied and sloped and contains a wet weather creek. Moreover, defendants, plaintiffs' grantors, asked the county health department to examine the property to determine if it could support a septic tank system before they bought it. Plaintiffs' intended grantee, James Ross, did the same. Certainly plaintiffs themselves could have asked the health department to make the same investigation. We find that

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the fact that the property could not be used for residential purposes was reasonably discoverable by plaintiffs. Their claim for breach of an implied warranty was properly denied.

[2] Plaintiffs next contend that they were entitled to a rescission of the deed in that the parties were mutually mistaken as to the suitability of the property for an on-site sewage system. Just as *Hinson v. Jefferson* is controlling on the implied warranty question before us, it also answers any question about mutual mistake. In that case, the court stated:

[b]ecause of the uncertainty surrounding the law of mistake we are extremely hesitant to apply this theory to a case involving the completed sale and transfer of real property. Its application to this type of situation might well create an unwarranted instability with respect to North Carolina real estate transactions and lead to the filing of many non-meritorious actions. Hence, we expressly reject this theory as a basis for rescission. 287 N.C. at 432, 215 S.E. 2d at 109.

We find that plaintiffs' contention is without merit, as the mutual mistake theory has been expressly rejected by the court in *Hinson, supra*. The order by the trial court denying plaintiffs' rescission of the deed is

Affirmed.

Judges HILL and BRASWELL concur.

WILLIE ROBERSON, JR. v. DOROTHY ROBERSON

No. 8214SC1354

(Filed 6 December 1983)

1. Trial § 3.2— denial of motion for continuance—no abuse of discretion

The trial court did not abuse its discretion in denying the respondent's motion for a continuance where the evidence tended to show that three weeks before the alternate trial date, respondent chose to allow her attorney of record to withdraw so that she could find more suitable counsel; that at the time respondent's counsel was allowed to withdraw, it was indicated to the court that respondent had already been in contact with other attorneys; that

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respondent was informed that she would have three weeks to locate new counsel; and that three weeks was ample opportunity to retain new counsel and respondent failed to do so.

2. Rules of Civil Procedure § 38— failure to make timely demand for jury trial

The trial court did not err in denying respondent's motion for a jury trial where (1) respondent waived her right to a jury trial by failing to make a timely demand pursuant to G.S. 1A-1, Rule 38, and (2) since respondent would have only been entitled to a jury trial on the issue of the statute of limitations, and the case was not decided on that issue.

APPEAL by respondent from *Braswell, Judge*. Order entered 27 July 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 November 1983.

Petitioner filed for partition by sale pursuant to G.S. 46-1 et seq. of a house and lot at 1201 North Mangum Street in Durham owned by petitioner and respondent as equal tenants in common. Respondent, then represented by counsel, filed an answer and counterclaim wherein she admitted that the real estate was owned by petitioner and respondent as co-tenants but denied that petitioner had a right to partition as said parties by agreement, express and implied, had agreed that respondent could live on the property for her lifetime or as long as she desired to do so. She counterclaimed that petitioner owed her certain monies and requested that an accounting be ordered to determine the exact amount owed. Petitioner denied the allegations of the counterclaim.

On 6 July 1982, the court allowed Eugene C. Brooks, III to withdraw as respondent's attorney of record and continued the case until 26 July 1982 so that respondent would have an opportunity to retain new counsel. According to the court's order, respondent had spoken with other attorneys about her case who advised her that she could seek a jury trial and could plead certain other matters. Mr. Brooks apparently disagreed with such advice.

Prior to the entry of the 6 July 1982 order, petitioner filed a motion for leave to amend his answer so as to plead the statute of limitations in bar of the counterclaim. On 26 July 1982, respondent made an oral motion to have the case continued which the court denied. The next day, the court allowed petitioner's motion to amend. The trial was then held, after which the court ordered

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that the real estate be partitioned by sale, and that respondent receive an additional \$1,000.00 from petitioner's share of the proceeds to satisfy monies due her by petitioner. From this order, respondent appealed.

Maxwell, Freeman, Beason & Morano, by James B. Maxwell and Homa J. Freeman, Jr., for petitioner appellee.

Holleman and Stam by Paul Stam, Jr., for respondent appellant.

ARNOLD, Judge.

[1] In her first argument, respondent contends the court erred in denying her motion to continue, thereby forcing her to proceed to trial without counsel. The evidence shows respondent was without counsel from 6 July 1982 until 27 July 1982 and had unsuccessfully attempted to obtain an attorney in the interim. In support of her motion for continuance, respondent offered a letter from her physician that was almost four weeks old.

It is well established that a motion for continuance is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed in the absence of a manifest abuse of discretion. *In re Coley*, 53 N.C. App. 318, 280 S.E. 2d 770 (1981). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976).

Respondent relies almost entirely on the case of *Shankle v. Shankle*, *supra*, however the facts of that case are clearly distinguishable. In *Shankle*, respondents' counsel withdrew from the case and departed from the courtroom on the day of the trial. Respondents had no way of knowing this was going to happen and were faced with circumstances beyond their control. The court held respondents were entitled to a continuance and ordered the cause remanded for a new trial.

In contrast, the record in the present case discloses that three weeks before the ultimate trial date, respondent chose to allow her attorney of record to withdraw so that she could find more suitable counsel. At the time respondent's counsel was allowed to withdraw, it was indicated to the court that respondent had already been in contact with other attorneys. Respondent

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was informed that she would have three weeks to locate new counsel. Thus, respondent was given ample opportunity to retain new counsel yet failed to do so. In light of this, we do not believe the court abused its discretion in denying respondent's motion for a further continuance.

Furthermore, the fact that petitioner had a pending motion for leave to amend his answer to the counterclaim at the time the motion for continuance was denied does not compel us to find an abuse of discretion. The amendment contained no allegations of fact and did not set up a new cause of action but merely set forth a further defense based upon matters already in the pleadings. The motion for leave to amend was filed 1 July 1982; therefore, respondent was given sufficient time to prepare a response to the proposed amendment.

[2] Secondly, respondent argues the court erred in denying her a jury trial on her equitable defenses and counterclaims. The record shows respondent did not make a timely demand for trial by jury pursuant to Rule 38 of the North Carolina Rules of Civil Procedure. By failing to demand such a trial in accordance with Rule 38, respondent waived her right to a jury trial. *Sykes v. Belk*, 278 N.C. 106, 179 S.E. 2d 439 (1971).

Assuming *arguendo* that respondent made a timely request for a jury trial with respect to petitioner's amendment, she would only have been entitled to a jury trial on the issue of the statute of limitations. Since this case was not decided on the issue of the statute of limitations, the refusal to grant a jury trial on such issue was harmless error.

In her third argument, respondent contends the court erred in excluding evidence which would have shown that petitioner was equitably estopped from seeking to partition the property in question. To estop a co-tenant from partitioning a piece of property, there must be an express or implied contract or agreement waiving the right to partition. *Kayann Properties, Inc. v. Cox*, 268 N.C. 14, 149 S.E. 2d 553 (1966). In the present case, there is no evidence of any such agreement or contract between the parties, nor is there any indication in the record that any evidence was excluded which tended to show such an agreement. The order of the trial court is

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Affirmed.

Judges HILL and EAGLES concur.

STATE OF NORTH CAROLINA v. JAKE EDWARD PLOWDEN

No. 833SC261

(Filed 6 December 1983)

1. Criminal Law § 86.16— in-court identification not tainted by photographic identification—sufficiency of evidence

The trial court properly determined that a rape victim's in-court identification of defendant was not tainted by a pretrial photographic identification and was admissible in evidence where the court found upon supporting evidence that the victim was first awakened by defendant in a well-lighted room where she observed defendant at close range; she was forced into another well-lighted room where she was able to observe defendant before and during the rape; her attention was focused almost exclusively on defendant for over seven minutes of the fifteen minutes he was in her presence; shortly after the assault she accurately described several major features of defendant's appearance; the day after the crime she selected defendant's photograph from two stacks of photographs within eight to twelve seconds; and her identification at trial was based on her personal observation of defendant's features on the night of the crime, was unequivocal and was not suggested by the photographs.

2. Criminal Law § 61— non-expert testimony concerning shoe print

The trial court properly admitted testimony by a non-expert witness concerning the similarity of defendant's shoe sole and a shoe print found at the crime scene.

3. Criminal Law § 116.1— instruction not comment on defendant's failure to testify

The trial court's instruction that "There was no evidence offered directly by the defendant, but there was a great deal of evidence elicited by way of cross-examination of the State's witnesses" did not constitute an improper comment on defendant's failure to testify, since the trial judge was merely reminding the jury to consider any evidence favorable to defendant that had been elicited on cross-examination.

4. Criminal Law § 173— instructions—invited error

A party may not complain of an instruction given or omitted at his request.

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APPEAL by defendant from *Reid, Judge*. Judgment entered 7 October 1982 in PITT County Superior Court. Heard in the Court of Appeals 14 November 1983.

Defendant was found guilty of second degree rape and first degree burglary. The State's evidence tended to show that defendant broke into the victim's apartment at night through a kitchen window. Defendant forced the victim into a bedroom and raped her. She then rushed to a neighbor's apartment for help. Later that night, two residents from the victim's apartment complex spotted defendant walking near the apartment. They summoned the police. Defendant was arrested on the basis of the victim's description of her assailant. The next day, the victim identified defendant in a photographic lineup as the man who raped her.

Defendant did not present evidence at the trial.

Attorney General Edmisten, by Kaye R. Webb, Assistant Attorney General, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

VAUGHN, Chief Judge.

[1] Defendant first contends the trial court erred by not suppressing the victim's in-court identification of him. Defendant maintains that the identification resulted from an impermissibly suggestive photographic lineup rather than the victim's recollection from the night of the rape. The photographs of defendant indicated his height, as did the photographs of other people shown to the victim. The photographs also contained the date they were taken, and defendant's photographs were dated closer to the rape date than the others.

When the admissibility of an in-court identification is challenged on the grounds that it is tainted by an out-of-court identification made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appeal. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

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The trial court must determine from the totality of the circumstances whether a pretrial photographic identification was impermissibly suggestive, and if so, whether it tainted the in-court identification. *State v. Clark*, 301 N.C. 176, 182-83, 270 S.E. 2d 425, 429 (1980). Reliability of an identification depends upon "(1) opportunity to view, (2) degree of attention, (3) accuracy of description, (4) level of certainty, (5) time between crime and confrontation." *Id.* at 183, citing *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972).

The judge made detailed findings of fact including, in substance, the following. The victim was first awakened by defendant in a well-lighted room where she observed defendant at close range. She was then forced into another well-lighted room where she was able to observe defendant before and during the rape. Her attention was focused almost exclusively on defendant for over seven minutes of the fifteen minutes he was in her presence. Shortly after the assault she accurately described several major features of defendant's appearance. The day after the crime she selected defendant's photograph from two stacks of photographs within eight to twelve seconds. Her identification at trial was based on her personal observation of his features on the night of the crime, was unequivocal and was not suggested by the photographs. These findings of fact are supported by competent evidence and are, therefore, conclusive on appeal. The assignment of error is overruled.

[2] Defendant next contends that the trial court erred in admitting testimony of a non-expert witness concerning the similarity of defendant's shoe sole and a shoe print found at the crime scene. This contention lacks merit. Non-expert testimony about shoe prints is admissible. *State v. Jackson*, 302 N.C. 101, 107-109, 273 S.E. 2d 666, 671-72 (1981). The basis or circumstances behind a non-expert opinion on a shoe print do not affect the admissibility of the opinion; instead, they go to the weight of such evidence. *Id.*

[3] During the jury charge, immediately after the judge recapitulated so much of the State's evidence as was necessary to declare and explain the law thereon, the judge told the jury:

There was no evidence offered directly by the defendant, but there was a great deal of evidence elicited by way of

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cross examination of the State's witnesses and you will consider that as you pass upon all of the evidence in this case.

Defendant, in essence, argues that the foregoing was an improper comment on defendant's failure to testify. We disagree. Obviously, the jury knew defendant had offered no evidence. The judge merely reminded the jury to consider any evidence favorable to defendant that had been elicited on cross examination.

[4] Defendant also argues that the statement was prejudicial because the judge did not add that defendant's failure to testify should not be considered as a basis for any inference adverse to him. The record discloses, however, that before the charge, defendant specifically requested the judge not to give the usual instruction on the failure of a defendant to testify. The record further discloses that after defendant indicated his dissatisfaction with the quoted part of the instruction, he expressly told the judge that he did want the judge to give an instruction to correct the alleged error. It is elemental that a party cannot invite an alleged error at trial and then complain of it on appeal. A party may not complain of an instruction given or omitted at his request. *Overton v. Overton*, 260 N.C. 139, 132 S.E. 2d 349 (1963).

No error.

Judges WELLS and JOHNSON concur.

STATE OF NORTH CAROLINA v. REGINALD SCOTT WATSON

No. 8326SC293

(Filed 6 December 1983)

Criminal Law § 138.6—resentencing hearing—improper consideration of evidence

In a resentencing hearing, the trial court erred in refusing to consider evidence of defendant's conduct subsequent to entry of his original sentence, or to consider reduction of his original sentence on the basis thereof.

Judge BECTON concurring.

State v. Watson

ON writ of certiorari to review order entered by *Snepp, Judge*. Order entered 24 September 1982 in Superior Court, MECKLENBURG County. Certiorari allowed by the Court of Appeals 18 November 1982. Heard in the Court of Appeals 15 November 1983.

Attorney General Edmisten, by Special Deputy Attorney General Jo Anne Sanford, for the State.

Gillespie & Lesesne, by Louis L. Lesesne, Jr., for defendant appellant.

WHICHARD, Judge.

I.

Defendant, then eighteen years of age, was convicted of armed robbery and sentenced to imprisonment of from fifty to seventy years. On appeal by defendant and a co-defendant, this court remanded for resentencing because the trial court sentenced the defendants as adult offenders without first finding that they would not benefit from the treatment provided youthful offenders in G.S. 148-49.10 *et seq.* *State v. Drakeford*, 37 N.C. App. 340, 347-48, 246 S.E. 2d 55, 60 (1978).

Upon resentencing the trial court determined that defendant would not benefit from resentencing as a youthful offender. It further ruled that, as a matter of law, it was without authority to sentence defendant *de novo*.

Subsequent to that resentencing, this Court held that a resentencing hearing upon remand for a finding under the youthful offender statute is to be *de novo*, and that the court can enhance or reduce the sentence "if based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *State v. Lewis*, 38 N.C. App. 108, 110, 247 S.E. 2d 282, 284 (1978). The trial court thereafter found that defendant had filed a motion for appropriate relief which alleged sufficient grounds for a resentencing hearing, and it ordered that a hearing for that purpose be held. At that hearing counsel for defendant asked for "some reduction of the original sentence." The court declined the request, stating, *inter alia*:

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Now, I'm not sitting here as the Board of Parole to recommend commutation of sentence. I'm sitting here on a resentencing hearing as to the situation at the time of the original offense. . . . I'm not here about what has happened to him since then. This is a resentencing based on factors relative to sentencing as they appeared when he was sentenced.

. . . .

I'm not considering what he's done since he's been in prison or what his correction officials say. Those are matters for the Board of Parole under the law. The only thing before me is whether this sentence at the time, and considering resentment and the factors and things that are relevant to criminal sentences, have been supported by the Judge's action at that time, supported by the evidence before him.

. . . .

I can't sit as a Board of Paroles and recommend commutation of the sentence.

. . . .

I'm going to let the sentence stand as it is.

It thereupon ordered that the motion for resentencing be denied, and that the original judgment be confirmed.

Defendant appeals from this order.

II.

In *State v. Lewis, supra*, this Court stated:

In making [the] determination [of "benefit" or "no benefit" pursuant to G.S. 148-49.10 *et seq.*] circumstances relevant to the imposition of the sentence may be considered by the judge *which were not considered by a judge who failed to comply with the statutory mandate in imposing sentence.* Fairness to the defendant in imposing sentence requires that the resentencing be *de novo* with the sentencing judge *having authority to impose a new sentence* rather than limiting resentencing to a determination of whether the youthful offender would benefit from treatment as a committed youthful

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offender. On resentencing the judge may find that defendant would benefit from treatment as a committed youthful offender and impose a sentence as provided by G.S. 148-49.14, or make a 'no benefit' finding and impose the same sentence, *or a lesser sentence, or a greater sentence if based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.*

Id. (emphasis supplied).

It appears from the trial court's resentencing hearing statements, quoted above, that it refused to consider evidence of defendant's conduct subsequent to entry of his original sentence, or to consider reduction of his original sentence on the basis thereof, on the ground that it lacked legal authority to do so. Under *State v. Lewis, supra*, it had that authority. The resentencing having thus apparently been performed pursuant to a misapprehension of the applicable law, the cause is remanded for resentencing.

The court has the authority to reimpose the original sentence if it chooses. *Id.* It must do so, however, if at all, in cognizance of its authority to do otherwise if "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" so indicates. *Id.*

Remanded for resentencing.

Judges HEDRICK and BECTON concur.

Judge BECTON concurring.

Although I find the trial court's reasoning sound, I am compelled to concur on the basis of this Court's decision in *State v. Lewis*, 38 N.C. App. 108, 247 S.E. 2d 282 (1978).

State v. Parr

STATE OF NORTH CAROLINA v. WILLIAM JACKSON PARR

No. 8321SC345

(Filed 6 December 1983)

1. Criminal Law § 91— Interstate Agreement on Detainers—requirements to invoke

To invoke the Interstate Agreement on Detainers, the defendant must file a request for disposition with the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction.

2. Criminal Law § 91— Interstate Agreement on Detainers—no request for disposition to county of charges

The Interstate Agreement on Detainers, G.S. 15A-761, did not require the dismissal of Forsyth County charges against defendant for failure to try defendant within 180 days following his request for a disposition of charges against him where Forsyth County never filed a detainer against defendant, and defendant only filed a request for a speedy trial in Guilford County relating to charges against him in that county.

APPEAL by defendant from *DeRamus, Judge*. Judgment entered 15 December 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 November 1983.

Defendant was charged in a proper bill of indictment with uttering a forged check. He was found guilty as charged and from a judgment imposing a prison sentence of five years, he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Michael Rivers Morgan, for the State.

William B. Gibson for the defendant, appellant.

HEDRICK, Judge.

The sole question presented for review is whether the court committed reversible error by denying defendant's motion to dismiss the charges due to the State's failure to try defendant within the time period required by N.C. Gen. Stat. Sec. 15A-761, the Interstate Agreement on Detainers.

On 20 March 1981, Forsyth County issued a warrant against defendant for uttering a forged check. On 7 March 1981 defendant had been arrested in Oklahoma on an Oklahoma charge. In April 1981, defendant was sentenced by an Oklahoma court to three

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years in prison. In the latter part of 1981, Guilford County filed a detainer against the defendant based upon four outstanding Guilford County warrants. On 4 February 1982, defendant requested a speedy trial pursuant to the provisions of the Interstate Agreement on Detainers. Defendant was returned to Guilford County on 31 March 1982. On 9 April 1982, while he was imprisoned in the Guilford County jail awaiting disposition of his cases, Forsyth County authorities served several warrants on defendant, including the 20 March 1981 warrant. On 7 September 1982, following dismissal of the Guilford County charges, defendant was taken to Forsyth County. On 23 November 1982, he filed a motion to dismiss the charges against him. This motion was amended on 29 November 1982.

Defendant contended in his motion that the provisions of N.C. Gen. Stat. Sec. 15A-761 were applicable to his Forsyth County case, and that since more than 180 days had elapsed following his request for a speedy trial pursuant to Article III of the Interstate Agreement on Detainers he was entitled to a dismissal. In the alternative, defendant alleged he was entitled to a dismissal under the statute because more than 180 days had elapsed since he had been served with the Forsyth County charges. Following a hearing conducted on 29 November 1982, Judge Rousseau denied defendant's motion.

N.C. Gen. Stat. Sec. 15A-761 in pertinent part provides:

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint:

. . .

West v. West

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. . . .

[1, 2] The Interstate Agreement on Detainers clearly relates only to those charges which are the basis for the issuance of the detainer. To invoke the Agreement the defendant must file a request for disposition with the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction. In the case *sub judice* a detainer was filed against defendant in Oklahoma based upon four outstanding warrants from Guilford County. The defendant's request for disposition related only to the Guilford County charges. Defendant's own evidence shows that Forsyth County never filed a detainer against him and that he never filed a request for a speedy trial in Forsyth County. Defendant's Forsyth County case, therefore, does not fall within the purview of the Interstate Agreement on Detainers, and the court did not err in its denial of defendant's motion to dismiss.

No error.

Judges WHICHARD and BECTON concur.

SANDRA WEST v. THOMAS E. WEST AND THE UNITED STATES OF AMERICA

No. 8212DC1343

(Filed 6 December 1983)

Appeal and Error § 6.2— interlocutory order—premature appeal

In a civil action in which plaintiff sought to have a California judgment accorded full faith and credit by having defendant held in contempt by the North Carolina courts, the order appealed from was interlocutory in that it resolved only one of several issues regarding whether the California judgment should be given full faith and credit.

West v. West

APPEAL by defendant West from *Keever, Judge*. Order entered 22 September 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 17 November 1983.

This is a civil action wherein the plaintiff seeks to have a California judgment accorded full faith and credit by having defendant West held in contempt by the North Carolina courts. The United States of America is joined as a party in an attempt by plaintiff to gain information regarding defendant West's military retirement.

From the entry of an order declaring that the California judgment is entitled to full faith and credit and ordering compliance with same, defendant West appealed.

Rose, Rand, Ray, Winfrey & Gregory, by Randy S. Gregory, for the plaintiff, appellee.

Barefoot & White, by Spencer W. White, for the defendant, appellant.

HEDRICK, Judge.

In her complaint, plaintiff prayed that her California judgment be accorded full faith and credit and that the judgment be enforced by a contempt proceeding. The California judgment in pertinent part provides:

The Court also orders that Respondent shall cause to be paid to Petitioner as her sole and separate property, one-half (1/2) of his gross monthly military retirement, commencing 1 February 1979 and continuing monthly thereafter so long as he receives such retirement.

...

The Court also orders Respondent to pay all premiums required to maintain in full force and effect the Pilot Life Insurance Company Policy No. 829424 insuring the life of Petitioner.

In his answer defendant West admitted that he had informed plaintiff that he did not intend to comply with the judgments of the California court, and interposed five defenses and a counterclaim.

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The trial court in an order filed 14 July 1982 stated, "that this matter involved several legal issues that will have to orderly be determined." The court then set a hearing on the first issue, the validity of the California judgment, for August 1982.

After the hearing, an order was entered 22 September 1982 in which the court found that the California judgment was entitled to full faith and credit. The court further ordered defendant West to comply with the California judgments, and retained the matter for further orders. From that order defendant West gave notice of appeal. Plaintiff moved to dismiss the appeal. The trial court denied the motion, stating: "the question of whether or not an appeal of the said order is proper should be decided by the Court of Appeals."

The first question we must decide is whether the order dated 22 September 1982 was interlocutory and the appeal therefrom premature. The trial court's order dated 14 July 1982 stated there were several issues to be answered, and the 22 September 1982 order resolved only the issue regarding whether the California judgment should be given full faith and credit.

Valid foreign judgments are enforceable only by bringing suit on the judgment to obtain a money judgment. Foreign judgments are not enforceable by civil contempt proceedings. *Sainz v. Sainz*, 36 N.C. App. 744, 245 S.E. 2d 372 (1978).

The 22 September 1982 order is clearly interlocutory in that it merely determines defendant's liability to the plaintiff. The judgment does not determine the amount of defendant's liability or the theory upon which it is based, which would determine the manner of its enforcement.

An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975). Having found the order appealed from interlocutory, and further finding that the order does not affect a substantial right, we are compelled to dismiss defendant West's appeal.

By this action we are not expressing an opinion as to the correctness of the order appealed from.

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The defendant West's appeal is hereby

Dismissed.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. LARRY E. SMITH

No. 8318SC373

(Filed 6 December 1983)

1. Criminal Law § 138— failure to find mitigating factor—issue raised for first time on appeal

Where the court's failure to find a mitigating factor is raised for the first time on appeal, the appellate court will find error only on a showing that the trial court abused its discretion.

2. Criminal Law § 138— mitigating factor—uncontradicted evidence

Where the evidence supporting a mitigating factor is uncontradicted and of manifest credibility, the court's failure to find the existence of such factor is error.

3. Criminal Law § 138— mitigating factor—burden of proof

In determining whether the evidence compels a finding of the existence of a particular mitigating factor, the defendant bears the burden of showing that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn and that the credibility of the evidence is manifest as a matter of law.

4. Criminal Law § 138— duress or compulsion mitigating factor—economic necessity

Even if economic necessity could constitute the "duress or compulsion" mitigating circumstance under G.S. 15A-1340.4(a)(2)(b), defendant's evidence did not compel the trial court to find such mitigating circumstance where it tended to show that defendant committed the crime of felonious breaking and entering because his status as a prison escapee made it difficult for him to find employment and that his crime was an attempt to do something on his family's behalf.

5. Criminal Law § 138— prior convictions as aggravating factor—absence of findings as to indigency and counsel

The trial judge did not err in considering defendant's prior convictions as an aggravating factor in imposing sentence without making findings concerning defendant's indigency and representation by counsel at the time of his prior convictions.

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APPEAL by defendant from *Freeman, Judge*. Judgment entered 2 December 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 November 1983.

Defendant was charged in a proper bill of indictment with felonious breaking or entering and felonious larceny. Pursuant to a plea arrangement, the defendant pleaded guilty to felonious breaking or entering and the State took a voluntary dismissal on the larceny charge. Following a sentencing hearing, the court found the following aggravating factor: "[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement." The court found no mitigating factors. Upon finding that the factors in aggravation outweighed the factors in mitigation the court imposed a sentence, greater than the presumptive term, of four years. Pursuant to N.C. Gen. Stat. Sec. 15A-1444(a1) defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney William H. Borden, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for the defendant, appellant.

HEDRICK, Judge.

[1-3] Defendant first assigns error to "the trial court's failure to find as a mitigating factor that the defendant committed the offense under duress or compulsion which significantly reduced his culpability." We note that defendant neither objected to the court's findings of fact nor tendered proposed findings of fact to the court. Where the court's failure to find a mitigating factor is raised for the first time on appeal, this Court will find error only on a showing that the trial court abused its discretion. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). Where the evidence supporting a mitigating factor is uncontradicted and of manifest credibility, however, the court's failure to find the existence of such factor is error. *State v. Graham*, 61 N.C. App. 271, 300 S.E. 2d 716 (1983). In determining whether the evidence compels a finding of the existence of a particular mitigating factor, the defendant bears the burden of showing that " 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,' and that the credibility of the evidence 'is manifest as a

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matter of law.' " *State v. Jones*, 309 N.C. 214, 220, 306 S.E. 2d 451, 455 (1983) (quoting *Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E. 2d 388, 395 (1979)).

[4] In the instant case, defendant contends that uncontroverted evidence established that his crime was motivated by economic necessity, and that this is equivalent to "duress or compulsion" under N.C. Gen. Stat. Sec. 15A-1340.4(a)(2)(b). Assuming *arguendo* that economic necessity could under any circumstances amount to "duress or compulsion" under the statute, it is clear that the evidence of economic necessity proffered by defendant falls far short of so clearly establishing duress "that no reasonable inferences to the contrary can be drawn." Nor can it be said that the credibility of defendant's evidence "is manifest as a matter of law." Indeed, the only evidence pertaining to defendant's reasons for breaking and entering derives from his testimony that he encountered difficulty in finding employment because of his status as a prison escapee, and that his crime was an attempt "to do something on [his family's] behalf." Defendant's contentions in this regard border on the frivolous.

[5] Defendant next assigns as error the trial court's finding as an aggravating factor that defendant had prior convictions punishable by more than sixty days imprisonment. Defendant contends that there was no evidence, and that the judge made no finding, about defendant's indigency or representation by counsel at the time of his prior convictions. This assignment of error is without merit under the recent decision of our Supreme Court in *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

Affirmed.

Judges BRASWELL and EAGLES concur.

State v. Teel

STATE OF NORTH CAROLINA v. RUBY PEARL TEEL

No. 833SC296

(Filed 6 December 1983)

Homicide § 28— failure to instruct on defense of habitation—no error

In a prosecution where defendant-wife was found guilty of the involuntary manslaughter of her husband, there was no prejudicial error in the failure of the trial court to instruct the jury on the subject of defense of habitation as an element of the defense of self-defense since (1) defendant possessed no right of habitation superior to her husband, and (2) self-defense, whether of person or habitation, is not a defense to *involuntary* manslaughter.

APPEAL by defendant from *Reid, Judge*. Judgment entered 11 September 1982 in Superior Court, PITT County. Heard in the Court of Appeals 15 November 1983.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.

Williamson, Herrin, Stokes & Heffelfinger by Milton C. Williamson and Ann Heffelfinger Barnhill for defendant appellant.

BRASWELL, Judge.

A wife shot and killed her husband. The jury's verdict was that the defendant-wife was guilty of involuntary manslaughter. Upon a finding of all mitigating factors and no aggravating factors in sentencing, the judge pronounced an active sentence of six months and one day. Defendant appeals, alleging as error the failure of the trial court to instruct the jury on the subject of defense of habitation as an element of the defense of self-defense. We find no error.

The evidence reveals that Ruby Teel and Jack Teel were married to each other and lived together in a house in Greenville. On 16 November 1981, Vivian Purvis, Mrs. Teel's daughter by a prior marriage, and several grandchildren were visiting in the Teel home. An argument began about a bottle of brandy Mr. Teel was to have purchased for Mrs. Purvis. Mrs. Teel, Mrs. Purvis, and the children left the house and went for the night to a trailer

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outside of Greenville where Mrs. Purvis and her children were living and where they had been staying for approximately three weeks. Mrs. Teel was not renting the trailer [also called mobile home]. The undisputed testimony discloses that the mobile home was owned by both Mr. and Mrs. Teel.

Approximately three hours after the first argument, Jack Teel arrived at the trailer. Mrs. Teel let him inside. Jack was drunk. The earlier argument resumed. Mrs. Teel told the defendant to leave and not to come back. Mr. Teel went outside, but did not leave. Mr. Teel took a crowbar, struck the trailer repeatedly, broke several windows on the trailer, and damaged other parts. As Mr. Teel continued his "assaults" on the trailer and made threats to kill his wife, Mrs. Teel got her revolver and fired two rounds through a bedroom window screen. From wounds received in the shooting, Mr. Teel died.

Mr. and Mrs. Teel were not legally estranged or legally separated. Mr. Teel was an owner of the premises, the habitation that Mrs. Teel was overtly defending. Mr. Teel was not a trespasser. *State v. Miller*, 267 N.C. 409, 148 S.E. 2d 279 (1966). Mr. Teel had a right, as between husband and wife, to be on the premises. She possessed no right of habitation superior to him. Even though she may well have intended to spend the night within the trailer, or to remain away from her husband until he "sobered up," the facts reveal Mr. Teel was lawfully on the premises. Furthermore, at trial, upon a showing in the evidence, the trial judge included appropriate instructions on Mrs. Teel's personal right of self-defense in his charge to the jury.

Considering the assignment of error in another light, we note that the jury was instructed to return one of four verdicts: guilty of second-degree murder, guilty of voluntary manslaughter, guilty of involuntary manslaughter, or not guilty. The verdict was guilty of involuntary manslaughter. We hold that self-defense, whether of person or habitation, is not a defense to *involuntary* manslaughter. The jury having found the defendant not guilty of the only charges to which self-defense could legally apply, the alleged error of failure to instruct on defense of habitation was harmless beyond a reasonable doubt.

State v. Alford

No error.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. JOSEPH GRAY ALFORD

No. 8316SC378

(Filed 6 December 1983)

Criminal Law § 169.5— admission of testimony as harmless error

In a robbery, kidnapping and rape prosecution in which the victim testified that she had bitten defendant on what she thought was a finger of his right hand, defendant failed to show that he was prejudiced by an officer's testimony that at the time defendant was arrested his left thumb appeared to have been severed and by photographs illustrating such testimony.

APPEAL by defendant from *Herring, Judge*. Judgments entered 28 September 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 29 November 1983.

Defendant was charged in proper bills of indictment with armed robbery, kidnapping and rape.

Defendant was convicted of kidnapping and attempted second degree rape, and from judgments imposing consecutive prison sentences of twenty years for kidnapping and five years for attempted rape, he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Steven F. Bryant, for the State.

Angus B. Thompson, Jr., for the defendant, appellant.

HEDRICK, Judge.

The sole question presented for review is whether the trial court erred by admitting into evidence pictures of defendant's hands and testimony explaining those pictures. The victim testified that she had bitten the defendant on what she thought was a finger of his right hand. A deputy sheriff testified that when defendant was taken into custody, his left thumb appeared to have been severed. The deputy was then allowed to explain his

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testimony by using three photographs of defendant's hands taken at the time of arrest. The photographs were admitted into evidence for the purpose of illustrating the deputy sheriff's testimony.

To obtain a new trial, defendant must show that he was prejudiced by some error of the court, and that a different result would likely have occurred if the court had not erred. *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971); *State v. Patton*, 45 N.C. App. 676, 263 S.E. 2d 796 (1980); *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970), *reversed on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971). Assuming *arguendo* that it was error for the court to admit the testimony regarding defendant's left hand and illustrative pictures, defendant has failed to show how he was prejudiced by its admission. We are, therefore, compelled to find,

No error.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. WILLIAM E. BARNES

No. 832SC127

(Filed 6 December 1983)

Criminal Law § 143.4— revocation of probation—record silent on indigency and counsel—active prison sentence improperly imposed

Where the record is completely silent as to whether the defendant was indigent, whether the defendant knew he had a right to counsel and whether he made a knowing waiver of his right to counsel at his original trial, the trial judge should not have imposed an active prison sentence after revocation of a judgment of probation.

APPEAL by defendant from *McLelland*, Judge. Judgment entered 5 November 1982 in Superior Court of MARTIN County. Heard in the Court of Appeals 18 October 1983.

Attorney General Rufus L. Edmisten by Assistant Attorney General Steven F. Bryant for the State.

J. Melvin Bowen for defendant appellant.

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HILL, Judge.

Defendant appeals revocation of a judgment of probation and the imposition of an active sentence. It appearing on appeal that the record is completely silent as to whether the defendant was indigent, whether the defendant knew he had a right to counsel and whether he made a knowing waiver of his right to counsel at his original trial, the trial judge should not have imposed an active prison sentence. *State v. Neeley*, 307 N.C. 247, 297 S.E. 2d 389 (1982). We therefore vacate the judgment entered at the 29 April 1981 Criminal Session of the District Court of Martin County and twelve months prison sentence. The cause is remanded to the District Court of Martin County for a new trial.

We feel we are bound in our decision by *State v. Neeley, supra*. Nevertheless, we endorse the premise that where a defendant stands silent and does not inform the trial judge of his indigency and lack of knowledge of his right to counsel at any hearing, he deprives the trial division of the opportunity to pass on the constitutional question and should be properly precluded from raising the issue on appeal. See *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983).

Reversed and remanded.

Judges ARNOLD and BRASWELL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 DECEMBER 1983

CATAWBA CO. v. BENTLEY No. 8325DC515	Catawba (82CVD429)	Affirmed
CURRIE v. STATE OF N.C. No. 8329DC375	Henderson (82CR7195)	Dismissed
HEAFNER v. HEAFNER No. 8322DC172	Alexander (77CVD4)	Affirmed
IN RE PIKE No. 8226DC1297	Mecklenburg (80-J-478)	Affirmed
NEELAND v. MURPHY No. 827SC1062	Wilson (81CVS1057)	Affirmed
PARSONS v. TRIPLET No. 8325DC202	Caldwell (80CVD1017)	No Error
PINNER v. BROWN No. 8228SC625	Buncombe (80CVS2537)	Affirmed
RUMBOUGH v. RUMBOUGH No. 8325DC522	Catawba (81CVD26)	Dismissed
STATE v. BARON No. 8317SC322	Surry (81CR263) (81CR285) (81CR286) (81CR287)	Remand for Resentencing
STATE v. COLEY No. 838SC513	Wayne (82CRS8929)	No Error
STATE v. GULLEY No. 8311SC376	Johnston (82CRS9453)	Affirmed
STATE v. HALLYBURTON No. 8325SC531	Burke (82CRS7797)	No Error
STATE v. HAMILTON No. 8326SC406	Mecklenburg (82CRS59643) (82CRS62669)	No Error
STATE v. HARRIS and ARRINGTON No. 8328SC263	Buncombe (82CRS19962) (82CRS20024)	No Error
STATE v. HOLDER No. 834SC420	Sampson (82CR8734)	No Error
STATE v. JONES No. 8327SC461	Gaston (82CRS15994)	No Error

STATE v. MURRELL No. 833SC226	Carteret (79CRS1952)	No Error
STATE v. SHIVAR No. 834SC246	Jones (82CRS316)	No Error
STATE v. TAYLOR No. 832SC270	Washington (82CRS1467) (82CRS1469) (82CRS1604)	No Error
STATE v. WELCH No. 834SC314	Onslow (78CRS12511)	New Trial
STATE v. WILSON No. 8322SC418	Iredell (82CRS11088) (82CRS11089)	No Error

State v. Baker

STATE OF NORTH CAROLINA v. HAROLD AUBREY BAKER

No. 8323SC245

(Filed 20 December 1983)

1. Receiving Stolen Goods § 5.1— receiving stolen pickup truck—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for receiving a stolen 1978 blue and beige pickup truck in violation of G.S. 20-106 where it tended to show that defendant was in possession of the blue and beige pickup truck which had been stolen in Tennessee; defendant was also in the possession of a 1978 red pickup truck which he had purchased from a salvage dealer; the original owner of the red pickup had assigned his rights in the red truck to his insurance company after the truck was stolen, wrecked and burned and the company paid him for the loss but had not signed the title to the truck, although the Virginia certificate indicates that title was assigned to defendant by the original owner; the salvage dealer who sold the red truck to defendant failed to sign the title; the red truck's serial number plate was missing and had been attached to the door of the blue and beige truck with rivets which were not the type used by the truck manufacturer; and defendant had obtained a North Carolina title for the red truck which he contended he thought was the title for the blue and beige truck.

2. Searches and Seizures § 3— wrecked truck—search in customer parking area—no reasonable expectation of privacy

Defendant had no reasonable expectation of privacy in a wrecked truck which he had placed in plain view in the customer parking area of his business in order to sell its parts, and a Division of Motor Vehicles inspector who was lawfully on the premises could properly testify that when he approached the truck he could see in plain view that the serial number plate was missing from the truck door. Moreover, a photograph of the truck was admissible to illustrate the inspector's testimony.

3. Criminal Law §§ 84, 169.3— illegal search—admission of testimony as harmless error

The admission of testimony gained through an illegal search that the frame serial number of the pickup truck in defendant's possession began with "F10" was harmless error where the witness had previously testified that this type of truck would have a serial number beginning with F10.

4. Searches and Seizures §§ 3, 13— search of vehicle at service station for serial numbers—lawfulness

A Division of Motor Vehicles inspector's search of defendant's pickup truck to obtain serial numbers from the truck door and body frame while it was at a service station for repairs was lawful since (1) the service station operator had general access to the truck's door and body and properly gave his consent to an inspection thereof; (2) defendant lost his reasonable expectation of privacy in the serial numbers when he placed the truck in the possession of the service station operator; and (3) the inspector was authorized under

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G.S. 20-49(5) to inspect the truck at a repair shop where he had a legitimate reason for checking the identification numbers of the truck.

5. Criminal Law § 43— photographs of truck after unlawful seizure—admission to illustrate lawful search

Photographs of a truck taken after its allegedly unlawful seizure were properly admitted to illustrate testimony concerning an earlier lawful search of the truck.

6. Criminal Law § 71— “stolen” truck—shorthand statement of fact

A witness's testimony that his truck was “stolen” was admissible as a shorthand statement of facts within the witness's personal knowledge.

7. Criminal Law § 131.2— newly discovered evidence—denial of new trial

Defendant's motion for appropriate relief on the basis of “newly discovered evidence” allegedly found in a National Automobile Dealers Association book was denied where the evidence merely tended to contradict or impeach the testimony of a State's witness and was not of such a nature to show that a different result would properly be reached at a new trial, and where the book was not shown to have been unavailable for use during the original trial. G.S. 15A-1415(b)(6).

8. Automobiles and Other Vehicles § 5— making false affidavit for title—insufficient indictment

An indictment for knowingly swearing or affirming falsely to an application for title to a motor vehicle was invalid where it failed to allege what information on the application was false. G.S. 20-112; G.S. 20-52; G.S. 15A-924(a)(5) and (e); G.S. 15A-954(a)(10).

APPEAL by plaintiff and defendant from *Fountain, Judge*. Judgment entered 7 October 1982 in Superior Court, WILKES County. Heard in the Court of Appeals 27 October 1983.

Attorney General Edmisten by Special Deputy Attorney General Issac T. Avery, III, for the State, appellant-appellee.

J. Gary Vannoy and Anthony R. Triplett for defendant appellant-appellee.

BRASWELL, Judge.

Two stolen trucks appeared in the possession of Harold Aubrey Baker. Mr. Baker was indicted on charges of receiving a stolen 1978 Ford F150 truck in violation of G.S. 20-106, altering or changing the vehicle's serial number in violation of G.S. 20-109(b)(1), and making a false affidavit for title prohibited by G.S. 20-112. In response to the defendant's pretrial motion, the

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trial court dismissed the charge of making a false affidavit on the ground that it failed to adequately charge a crime. The State has appealed this ruling. The defendant was tried before a jury on the remaining two charges and was found guilty of the single charge of receiving a stolen vehicle. The defendant has appealed the return of this guilty verdict.

The ultimate questions presented for our review concern: (1) the denial of the defendant's motions to dismiss and to set aside the verdict due to the insufficiency of the evidence; (2) the admission of evidence obtained through allegedly illegal searches and seizures; and (3) the dismissal of the charge of making a false affidavit as presented for review by the State. After considering each assignment of error raised by the defendant and the State, we hold the rulings of the trial judge were without error.

The State's evidence tended to show that in May of 1978 the first truck, a blue and beige 1978 Ford F150 Ranger pickup truck, was stolen from Mack Cook, the owner of Nationwide Auto Sales in Johnson City, Tennessee. Mr. Cook testified that the recorded serial number on this truck was "F15HUBC6586." He also testified that he had never sold this truck to the defendant or to anyone else. The second truck, a red 1978 Ford F100 pickup truck, was stolen from Elihu Lloyd, and was taken to Beech Mountain where it was wrecked and burned between late 1978 and early 1979. Mr. Lloyd testified that he never signed the title to the truck which now contains a signature purporting to be his, but instead only signed a document transferring to Travelers Insurance Company the right to sign the title to this truck after the insurance company had paid him for his loss under his theft policy.

The burned red truck was bought from Travelers Insurance by David Kidd who runs a salvage yard and who has a contract with Travelers Insurance Company to purchase salvage in several counties, including the county where the red truck was located. Mr. Kidd sold the red truck to Harold Gilpin, also a salvage dealer, but failed to sign the title he had received from Travelers Insurance when he transferred the truck to Mr. Gilpin.

Johnny Gilpin, the son of Harold Gilpin, testified that in 1979 he went to Kidd Chevrolet and picked up the red truck for his father who said he had the title to it. He saw the defendant at his

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father's business, heard the defendant say he wanted to buy the red truck, watched his mother and father haul away the red truck, then later saw this truck parked at Yesterday's Antique Shop which is owned and operated by the defendant. Kathy Gilpin, wife of Harold Gilpin, testified that she and her husband took the red truck to Yesterday's Antique Shop and left it there. Her other son, Harold Dwayne Gilpin, testified that he went to the defendant's antique store and removed the bed off the red truck pursuant to a deal his father had made with the defendant.

As of the time of trial, Harold Gilpin, the father and husband of this family, had left the State and had been gone for eight or nine months. All of the above witnesses for the State, except Mack Cook, indicated that at no time did they ever possess or own the blue and beige pickup truck that was seized by officers from the defendant.

Other evidence from the State revealed that in June of 1982, John Turney, an Inspector with the Division of Motor Vehicles for Wilkes County, received a telephone call from the Mayor of North Wilkesboro and an anonymous telephone call stating that the two trucks in the possession of defendant were stolen. Turney began his investigation on 20 July 1982 by going to Yesterday's Antique Shop which was closed in order to view the red truck that was parked outside. With no chain, barrier or "No Trespassing" signs present to prevent him from walking up to the truck, he noticed through the pickup's open door that the red truck's serial plate was missing. Because the vehicle was parked against the building, he was unable to check the truck's frame serial number.

Mr. Turney testified that a motor vehicle is identified by the Division of Motor Vehicles by its manufacturer's serial number. This number is a combination of letters and numbers assigned by the vehicle's manufacturer and coded in a particular way so that the Division of Motor Vehicles can identify the type of vehicle through its serial number. This manufacturer's serial number is identical to the public serial number which is attached by two rivets on the inside of the truck's door. The manufacturer's number is stamped into the truck's metal frame and is located in different places on different kinds of trucks.

He also testified that he had seen the defendant driving the blue and beige truck many times. After he had discovered that

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the red truck's serial number plate was missing, he began looking for an opportunity to check the number on the defendant's blue and beige truck. His chance came on 3 August 1982. He had gone to the Main Street Gulf Service Station to check their inspection records when he saw the blue and beige truck sitting in the station's bay raised up on a lift. After receiving permission from the station operator to inspect the truck, Mr. Turney opened its door and found the public serial number, "F10GNBH2273." He realized that the rivets used to attach the plate to the door were oversized, covering a portion of the plate's letters and numbers, and that they were not the type used by Ford Motor Company. He walked under the truck which was already raised to the location of the frame number and through the use of a mirror and lights determined its number to be "F15HUBC6586."

On 6 August 1982 through the National Crime Information Center, Mr. Turney identified the "F15" number taken off the blue and beige truck and talked to Mack Cook, the last registered owner of the truck. Through the "F10" number, he was able to find previous owners of the red truck although the "F10" serial plate was now on the door to the blue and beige truck of the defendant. On 19 August 1982, the defendant was arrested and both trucks were seized by the police pursuant to search warrant. The serial number of the red truck obtained through this search was excluded as evidence at trial.

Mr. Turney testified that the defendant had applied for a North Carolina title to a "1978 Ford truck" with a serial number of "F10GNBH2273." The Virginia title to the truck was in the name of Elihu Lloyd and the title had been assigned to the defendant. This application for title had a space to record both the series model and the color of the vehicle, but neither of these spaces were completed.

The defendant, on the other hand, testified that in 1979 he was driving through Virginia looking for antiques to buy for his business when he saw a blue and beige pickup truck parked in front of a vacant building with a "for sale" sign. He talked and dickered with a man who said that if the defendant would buy the blue and beige truck for a particular price he would also give him the red burned truck for parts. This man was "short, heavysset, black headed and had on some type of western hat." The defend-

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ant pulled the two trucks back to his place of business and later that evening he and his wife went back after his car that he had left there. The defendant stated that he got a title to one of the trucks from the man and that he assumed the title went with the blue and beige truck since the red truck was unusable. The title given to the defendant was not completely filled out, but had been signed. The signature on the title was "Elihu Lloyd," and the defendant identified the previous State's exhibit which had been determined to be the title to the red truck as the title given to him by the man in Virginia that day.

A few days after this encounter, the defendant applied for a North Carolina title to the truck using the information off the Virginia title he had received. When the title was issued on 19 April 1979, the defendant again assumed that he had received a title to the blue and beige truck. He explained that he parked the red truck beside his business in open view and later, after receiving a telephone call concerning the truck, sold the bed from the truck.

Finally, the defendant testified that he did not change the plate from the red truck to the blue and beige truck and that he had no knowledge that either truck had been stolen. He stated that even though he had been a car dealer he did not know that the "F10" serial number did not go with the "F15" model of truck or that North Carolina had a salvage law, requiring titles for junked vehicles sold as a whole. His wife, daughter, and an employee were all present when he arrived at the antique store with both trucks. The defendant and his wife have since been back to Virginia to try and find the man who sold him the truck and the place where it was sold, but were unable to locate either.

I.

The defendant asserts that the trial court committed reversible error by denying his motion to dismiss and his motion to set aside the verdict because there was insufficient evidence to warrant submitting the case to the jury and to sustain the jury's verdict of guilty. A motion to dismiss for insufficiency of the evidence requires "a consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E. 2d

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204, 208 (1978). The State standard in weighing the sufficiency of the evidence to support a criminal conviction requires that there be "substantial evidence of each essential element of the offense charged." *State v. Smith*, 300 N.C. 71, 78, 265 S.E. 2d 164, 169 (1980). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 78-79, 265 S.E. 2d at 169. The appropriate standard of review of a claim of insufficient evidence under the federal standard is whether there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed. 2d 126 (1979). Although articulated somewhat differently, this standard as interpreted by the North Carolina Supreme Court is the same in substance as the State rule. *State v. Earnhardt*, 307 N.C. 62, 66-67, fn. 1, 296 S.E. 2d 649, 652, fn. 1 (1982); *State v. Jones*, 303 N.C. 500, 504-05, 279 S.E. 2d 835, 838 (1981).

The defendant was convicted of "Receiving or transferring stolen vehicles" under G.S. 20-106. This statute states in part: "Any person who . . . has in his possession any vehicle which he knows or *has reason to believe* has been stolen or unlawfully taken . . . shall be punished as a Class I felon." (Emphasis added.) Because the purpose of this statute "is to discourage the possession of stolen vehicles," *State v. Rook*, 26 N.C. App. 33, 35, 215 S.E. 2d 159, 161, *appeal dismissed*, 288 N.C. 250, 217 S.E. 2d 674 (1975), the State need only prove that the "defendant 'knew or [had] reason to believe' that the vehicle in his possession was stolen. No felonious intent is required." *State v. Murchinson*, 39 N.C. App. 163, 168, 249 S.E. 2d 871, 875 (1978), *overruled on other grounds*, 45 N.C. App. 510, 263 S.E. 2d 298 (1980).

[1] Whether the defendant knew or should have known that the vehicle was stolen "must necessarily be proved through inferences to be drawn from the evidence." *Id.* The evidence giving rise to such inferences so as to lead a rational trier of fact to find guilt beyond a reasonable doubt is as follows: (1) The blue and beige truck with frame serial number "F15HUBC6586" was stolen from Mack Cook. (2) Turney, with the consent of the service station owner who had custody of the blue and beige truck, determined that the serial number from the plate was "F10GNBH-2273." The frame number was "F15HUBC6586." (3) Turney knew

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immediately that a "F10" number was not appropriate for this type of truck. (4) The same vehicle description for the red truck and the "F10" number appeared on a Virginia certificate of title under the name of Elihu Lloyd. (5) Lloyd's red truck had been stolen, wrecked, and burned, and he had assigned his rights to the red truck to his insurance company who had paid him for the loss although the actual Virginia certificate indicates that title was assigned to the defendant by Lloyd. (6) David Kidd testified that he bought the red truck from Lloyd's insurance company and sold it to Harold Gilpin but through an oversight failed to sign the title in the sale to Gilpin. (7) Gilpin's family testified that Harold Gilpin who had left the State sold the red truck to the defendant.

This evidence with the fact that the doorplate on the red truck was missing, that the serial number plate on the blue and beige truck was attached by oversized rivets, that the defendant had been in the automobile business, and that the defendant possessed both trucks with switched serial numbers gives rise to an inference that the defendant knew the truck was stolen or at least should have known the truck was stolen.

Ultimately, sufficiency of the evidence necessarily depends on the credibility of the State's witnesses as determined by the jury. Basically, the jury, as revealed through their verdict, believed the Gilpin family rather than the defendant as to how the defendant acquired the red truck. They also believed other State's witnesses, including Elihu Lloyd, who testified that he did not sell either truck to the defendant and did not sign the title which now bears his signature, instead of the defendant who explained that he assumed the title he received was for the blue and beige truck and assumed that the man who sold the trucks to him had legally signed the title as "Elihu Lloyd."

The elements of this offense require the defendant (1) to have possession, and (2) to know or have reason to believe the vehicle was stolen. As shown above, there was substantial evidence of each element to justify a rational trier of fact to find guilt beyond a reasonable doubt. We hold that there was sufficient evidence to submit the case to the jury and to support the verdict rendered.

II.

Several of the defendant's assignments of error concern the searches and seizures of the two pickup trucks. Inspector Turney

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first viewed the burned red truck at the defendant's antique store. The blue and beige pickup was examined at a service station where the truck was being repaired. After this investigation, an arrest warrant was issued against the defendant. Search warrants for both trucks were also issued and the trucks were located and seized. It was from this search and seizure of the red truck that its frame serial number was discovered. The defendant prior to trial, on the basis that the affidavit accompanying the search warrant set forth insufficient facts to establish probable cause, made a motion to suppress the evidence obtained from the searches of both vehicles after the defendant's arrest. The trial court granted the defendant's motion with respect to the red pickup truck.

A. RED TRUCK

Because of this suppression ruling the defendant asserts that it was error for the trial court to admit into evidence State's Exhibit No. 5, a photograph of the red truck's inside left door revealing two holes where the missing serial number plate should have been located. This photograph was taken after the defendant had been arrested and the red pickup was seized. Inspector Turney testified that on 20 July 1982 he went to the parking lot of the defendant's antique shop and without having to open the red truck's door saw the two holes and that the serial number was missing. Inspector Turney testified to these facts without objection and also stated that he could use the photograph which was a true and accurate representation of the red truck's door to illustrate his testimony. Only when he started towards the jury to point out in the photograph the holes in the door did defense counsel make an objection which was overruled. The trial judge instructed the jury that the photo was admissible only for illustrative purposes and not as substantive evidence.

[2] Inspector Turney testified that his first inspection of the red truck occurred while it was located in an area used for customer parking by the defendant's business. There were no "No Trespassing" signs or barriers to prevent Turney from viewing the truck or to indicate that he should not be on the defendant's commercial premises. The fourth amendment protects against governmental intrusion into areas in which the citizen has a reasonable expectation of privacy. *Katz v. U.S.*, 389 U.S. 347, 88 S.Ct. 507, 19

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L.Ed. 2d 576 (1967). Since Turney was lawfully present on the defendant's property, the defendant had no reasonable expectation of privacy in a truck which he had placed in plain view in order to sell its parts and which had been left on property meant for the public's use. See *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, *reh'g denied*, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed. 2d 120 (1971). As Turney indicated through his testimony even the place inside the truck's door where the serial number plate should have been was seen by him in plain view as he approached the truck without having to open the door. "Ordinarily, photographs are competent to be used by a witness to explain or illustrate anything that is competent for him to describe in words." *State v. Swift*, 290 N.C. 383, 395, 226 S.E. 2d 652, 662 (1976). Therefore, since Inspector Turney could lawfully testify to what he saw during his inspection of the red truck while located at the antique store, a photograph illustrating his testimony, upon the laying of a proper foundation, was equally admissible. An examination of the record reveals that a proper foundation was in fact laid. Turney testified that the photograph, although taken after the red truck had been seized, was a fair and accurate representation of the truck and the inside of its left door as it appeared on the day he first inspected the truck. See 1 *Brandis on North Carolina Evidence* § 34 (1982). Because this photograph merely depicts what Turney saw before the red truck had been seized, it did not fall within the trial court's ruling which suppressed all the evidence obtained in a search of the red truck after it had been taken into custody. We hold that the photograph was properly admitted as illustrative evidence.

[3] The defendant further contends that the trial court erred by allowing Turney to testify to the partial frame number of the red truck. It was precisely this evidence that the defendant's motion to suppress sought to exclude. The following discourse occurred:

Q. What was the frame number from the red pickup truck?

MR. VANNOY: [Defense counsel] Objection.

THE COURT: Overruled.

[Exception No. 12]

A. F one zero

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MR. VANNOY: Your Honor, we filed a motion.

THE COURT: I know it. Yes, I know you did.

MR. VANNOY: I'd like to voir dire this man.

Subsequently, a voir dire was held and the trial court prohibited testimony concerning the frame number of the red truck. The defendant contends that allowing the "F one zero" into evidence was prejudicial error in spite of the fact that the remainder of the number never was allowed before the jury.

Our role in reviewing this alleged error is "to consider the trial record as a whole and to ignore errors that are harmless." *United States v. Hasting*, --- U.S. ---, ---, 103 S.Ct. 1974, 1980, 76 L.Ed. 2d 96, 106 (1983). Thus, the criminal defendant must show not only that an error was committed, but that prejudicial error occurred. *State v. Williams*, 275 N.C. 77, 89, 165 S.E. 2d 481, 489 (1969). Inspector Turney had previously testified without objection that Ford Motor Company distinguishes between different series of trucks by letters and numbers. He stated that an F100 truck's serial number would "[b]egin with F1 zero," with the "F" indicating Ford and the "one zero" identifying a series. Then, again without objection, he testified that he recognized the blue and beige truck to be an "F150 Ford Ranger Lariat" and the red burned truck was a "1978 Ford F100" pickup. In light of this evidence, the subsequent admission of only a portion of the red truck's frame serial number was harmless error since he had previously testified that this type of truck would have such a serial number. "It is well recognized in this jurisdiction that the admission of incompetent testimony is cured when substantially the same evidence is theretofore or thereafter admitted without objection." *State v. Covington*, 290 N.C. 313, 339, 226 S.E. 2d 629, 647 (1976).

The trial court excluded the remaining portion of the serial number, "GNBH2273," because it was obtained in a search pursuant to an invalid search warrant. If this evidence had been allowed before the jury, they would have realized that the serial number on the doorplate found on the blue and beige truck did in fact belong to the red truck which would have clearly been very prejudicial to the defendant. Instead, the trial court allowed testimony of the frame number only to the extent it had already

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been made known to the jury. The defendant cannot show that a different result would have occurred had this evidence been excluded. *State v. Williams, supra*. We hold that if the partial admission of the red truck's serial number was error, then it was at most harmless error.

B. BLUE TRUCK

[4] The defendant also assigns as error the admission of evidence obtained in the searches of the blue and beige truck before and after its seizure. The search prior to the truck's seizure occurred while it was located at a service station for repairs. From this search, Inspector Turney obtained the doorplate serial number as well as its frame number.

To contest a search and seizure alleged to have been conducted in violation of the Fourth Amendment, the defendant must show that he had a legitimate expectation of privacy in the area searched. *State v. Mettrick*, 54 N.C. App. 1, 11, 283 S.E. 2d 139, 145 (1981), *affirmed*, 305 N.C. 383, 289 S.E. 2d 354 (1982). In determining whether this search by Turney constituted an unreasonable search and seizure, it is important to remember that the defendant had left the blue and beige truck at a garage for servicing. After obtaining the consent of the garage operator, Turney opened the truck door to check the plate serial number and walked under the already lifted truck to obtain the manufacturer's frame number. First of all,

[v]alid third-party consent to a search may be given by one who "shares with the absent target of the search a common authority over, general access to, or mutual use of the place or object sought to be inspected under circumstances that make it reasonable to believe that the third person has the right to permit the inspection in his own right and that the absent target has assumed the risk that the third person may grant this permission to others."

United States v. Sellers, 667 F. 2d 1123, 1126 (4th Cir. 1981), *quoting United States v. Block*, 590 F. 2d 535, 539-40 (4th Cir. 1978). Surely, the garage operator had general access to the truck's door and body so as to be in a position to consent to Turney's inspection. "Moreover, whenever one 'knowingly exposes his activities [or effects] to third parties, he surrenders

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Fourth Amendment protections' in favor of such activities or effects." (Brackets in original). *Id.*, quoting *Reporters Com. v. American Telephone & Telegraph*, 593 F. 2d 1030, 1043 (D.C. Cir.), cert. denied, 440 U.S. 949, 99 S.Ct. 1431, 59 L.Ed. 2d 639 (1979); *State v. Boone*, 293 N.C. 702, 708, 239 S.E. 2d 459, 463 (1977). Since the defendant voluntarily exposed these serial numbers on the truck when he placed it in the possession of the bailee, he cannot now claim that he had a reasonable expectation of privacy in these serial numbers not in plain view.

Yet, more importantly, Turney, as authorized under G.S. 20-49(5), may "inspect any vehicle . . . in any public garage or repair shop . . . for the purpose of locating stolen vehicles and investigating the title and registration thereof." At this point in his investigation of the defendant, Turney had been notified by two informants that the vehicles in the defendant's possession were stolen and had seen for himself that the serial number plate on the red truck was missing. His investigation of the blue and beige truck was a further attempt by him to identify these vehicles. In *United States v. Powers*, 439 F. 2d 373, 375 (4th Cir.), cert. denied, 402 U.S. 1011, 91 S.Ct. 2198, 29 L.Ed. 2d 434 (1971), the Court stated that an

[i]nspection of a car's identification number differs from a search of a vehicle and seizure of its contents in one important aspect. The occupants of the car cannot harbor an expectation of privacy concerning the identification of the vehicle. The state requires manufacturers to identify vehicles by affixing identification numbers which are also recorded in registries where the police and any interested person may inspect them. Since identification numbers are, at the least, quasi-public information, a search of that part of the car displaying the number is but a minimal invasion of a person's privacy. A police officer, therefore, should be freer to inspect the number without a warrant than he is to search a car for purely private property.

In *State v. Bagnard*, 24 N.C. App. 54, 210 S.E. 2d 93 (1974), cert. denied, 286 N.C. 416, 211 S.E. 2d 796 (1975), this Court adopted the rationale of *Powers* and the standard cited to test the reasonableness of the search of the identification numbers. Using the objective standard promulgated by *Terry v. Ohio*, 392 U.S. 1, 21-22,

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88 S.Ct. 1868, 1880, 20 L.Ed. 2d 889, 906 (1968), the Court must ask:

[W]ould the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Believing *Powers* to be a sound approach to the issue, the Court in *Bagnard* further provides that "[t]his standard can be met . . . when the officer has a legitimate ground for checking the identification number." *Id.* at 58, 210 S.E. 2d at 96, *quoting Powers, supra*, at 376. In the present case the tips given by the two informants and the missing serial number plate from the red truck gave Turney a legitimate ground for checking the identification numbers on the blue and beige truck. Because the search was valid, we hold that the evidence obtained through this search was properly admitted at trial.

[5] Also, in connection with the blue and beige truck, the defendant contends that the trial court erred by denying his pretrial motion to suppress the evidence obtained when the truck was searched at the service station as well as when it was seized. Having already addressed the issue that the evidence obtained from the search prior to seizure was properly admitted, we must now determine whether the evidence admitted at trial pursuant to the post-seizure search was proper. The defendant concedes in his brief that the only evidence acquired in this search was various photographs taken of the blue and beige truck, including a picture of the serial number plate and the frame number. Since the photographs were admitted to illustrate Turney's lawful search of the truck while at the service station and were not the fruits of any later unlawful seizure, they were admissible. See *State v. Swift, supra*. The photographs, State's Exhibits Nos. 2, 8, 9, 10, and 11, illustrate only evidence and information obtained by Turney in his search of the truck at the service station. We hold that because these photos are representative of a lawful search, the trial court properly denied the defendant's motion to suppress them.

Finally, the defendant contests the testimony of Mack Cook in which he states that his blue and beige truck was "stolen" from his car lot. First of all, the defendant's one objection to the use of the word "stolen" was untimely in that the question and its

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answer as well as a second question had been put forth before the objection was uttered. Subsequently, the words "stolen," "taken," and "theft" were used by the prosecution and by the defendant to convey in a shorthand fashion what had happened to the blue and beige truck. The defendant lost the benefit of his objection when substantially the same evidence was thereafter or theretofore admitted without objection. *State v. Covington, supra*.

[6] In any event, we hold that allowing Mack Cook to testify that his truck was stolen when it was clear that this blue and beige truck was missing from his car lot, that he reported this fact to the police, that he was paid for his loss by his insurance company, and that this truck without his or his insurance company's authorization was now in the defendant's possession was not prejudicial error. Referring to the truck as stolen was merely a shorthand statement of these facts within the witness's personal knowledge. The fact that this witness did not know who had removed his truck does not mean that he did not have firsthand knowledge that it was taken without his permission or stolen. North Carolina courts have allowed on numerous occasions similar shorthand expressions. *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981). See *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977); *State v. Chambers*, 52 N.C. App. 713, 280 S.E. 2d 175 (1981).

III.

The defendant also made a motion for a mistrial on the grounds that certain testimony which had not been allowed before the jury was broadcast on a radio newscast program where the jury might have heard it. This motion was denied, and while assigning this denial as error, the defendant has failed to address the issue in his brief. We deem that he has abandoned this assignment of error. Rule 28(a), N.C. Rules App. Proc.; *Sutton v. Sutton*, 35 N.C. App. 670, 242 S.E. 2d 644 (1978).

IV.

MOTION FOR APPROPRIATE RELIEF

[7] The defendant filed a motion for appropriate relief in this Court on 3 October 1983. The alleged basis for the motion is newly-discovered evidence purporting to establish that all Ford long-bed, pickup trucks do not necessarily have serial numbers

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beginning with F15 and that all Ford short-bed, pickup trucks do not necessarily have serial numbers beginning with F10. The source of this new information is alleged to be through the written publication "National Automobile Dealers Association Book, 1976-1983." The motion is dated 29 September 1983 and says that it was "within the past thirty (30) days" that his new evidence was discovered. The trial occurred in October 1982 with judgment entered 7 October 1982, a delay of approximately eleven months from the giving of the testimony which the defendant would now seek to contradict at any new trial.

The controlling statute on newly-discovered evidence through which relief is asserted is G.S. 15A-1415(b)(6). The requirements for granting relief on this basis of newly-discovered evidence has been fully analyzed and interpreted in *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976).

The authority for making a motion for appropriate relief in the appellate division is found in G.S. 15A-1418(b). Under that section we are first required to "decide whether the motion may be determined on the basis of the materials before it," or whether to remand for an evidentiary hearing in the trial division. Upon a review of the materials, we conclude that the motion can be determined in conjunction with the direct appeal. We hold that the motion reveals an insufficient basis to award a new trial, that the purported evidence is not newly-discovered evidence within the meaning of *Beaver* or of the statute, and the motion is denied.

Although the motion is verified by the defendant on information and belief, there is no affidavit in support of it by any person who would allegedly testify to the allegations in the motion. The State, in its response of 18 October 1983, filed an affidavit of Lloyd Letterman, Administrative Assistant to the Director of the North Carolina Department of Transportation, Division of Motor Vehicles, License and Theft Section. Mr. Letterman's affidavit shows that he has been so employed since July 1970, and that he is familiar with the procedure for assigning serial numbers to 1978 Ford pickup trucks, that the manufacturer determines the coded sequence of letters and numbers, and that a person properly trained can tell from the serial number the vehicle model series that bears the serial number. Mr. Letterman states that "[a] 1978 Ford 'F150' pickup truck can have a short bed or a long bed and likewise for the 'F100,'" and he clarifies by adding:

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VI. Even though a short bed pickup can be an "F150" and a long bed truck can be an "F100", the series model ("F150" or "F100") can always be determined by reference to the serial number. An "F150" model truck will always have the serial number beginning "F15" and "F100" series model will always have a serial number beginning with "F10."

Referring back to the original trial testimony, State's witness John W. Turney testified that he had been a License and Theft Inspector with the Division of Motor Vehicles for 17 years. During the course of his testimony on this subject there were no objections, exceptions, or motions to strike as to any question or answer. The topic of serial numbers was introduced through this question:

Q. How is a motor vehicle, particularly a pickup truck, identified by the Division of Motor Vehicles?

A. By the Manufacturer's serial number [which he also referred to as being the same as "VIN, vehicle identification numbers"].

. . . .

Q. Can you tell by looking at the manufacturer's serial number what type vehicle this ought to belong on?

A. Yes, sir.

Q. How do you do that?

A. Well, on Ford Motor Company code their pickup trucks, if it is an F150 which is a short bed they begin with F, which indicates Ford and one zero which indicates a series.

Q. You said F150 is a short bed?

A. No, F150 is a long bed.

Q. What is the short bed for the Ford truck?

A. F100

When asked what the series numbers mean Mr. Turney replied: "A. It is the type engine, transmission and the plant where was manufactured," and that these numbers were "[e]ssentially production number assigned to the vehicle and a numerical sequence."

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Under all the uncontradicted evidence before us we hold that there was no dispute at trial, nor now by motion, that the 1978 Ford pickup, blue in color, had a manufacturer's serial number in the F150 series and that the red, burned Ford had an F100 series original number. In accordance with Mr. Letterman's affidavit we accept as true the statement that a 1978 Ford F150 pickup can have a short bed or a long bed and likewise for the F100 series. This evidence, we hold is not of such a nature to show that a different result would probably be reached at a new trial. *State v. Beaver, supra*. At most, this new evidence merely tends to contradict and to impeach or discredit the testimony of Mr. Turney. The defendant's motion fails to show that due diligence was used and the proper means employed to procure the testimony of as yet unnamed persons to qualify to speak with authority on the identical subject which was revealed to the defendant in the course of the trial. There was no request for a recess or continuance to obtain impeaching material. The motion states the new information came from a "National Automobile Dealers Association Book, 1976-1983." It would seem that such a publication would be known to defendant when the evidence shows him to have been a former motor vehicle dealer. At any rate the book, or some similar book, is not shown to have been unavailable for use during the original trial. To contend approximately eleven months later that the book would have been used for cross examination if counsel had known about it is, in our view, without merit. As interpreted by the State in its response, "[t]he mere fact the transcript indicates a reference to a short and long bed does not make the testimony incorrect." Even though some confusion may exist as to whether body style or gross weight or length determines which number the model series carries, it is beyond question in this record that the F150 vehicle was a blue 1978 Ford pickup truck and that the red, burned 1978 Ford pickup truck bore an F100 serial number. The number on the blue 1978 Ford also corresponded with the number of the stolen vehicle denominated in the bill of information upon which the defendant was tried and convicted.

V.

THE STATE'S APPEAL

[8] The State separately appealed pursuant to G.S. 15A-1445 (a)(1), the trial court's dismissal of the charge of knowingly swear-

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ing or affirming falsely to the application of title for the blue and beige truck. The dismissal was granted on the grounds that the indictment failed to charge a crime. The indictment alleges:

that on or about the 3rd day of April, 1979, in Wilkes County Harold Aubrey Baker unlawfully and wilfully did feloniously knowingly swear or affirm falsely to the application for title for a 1978 Ford truck vehicle identification number F10-GNBH2273 required by the terms of Article 3 of Chapter 20 to be sworn or affirmed to in violation of the following law: 20-112.

Although the State and the defendant contend in their briefs that the indictment is valid only if Article 3 of Chapter 20 requires an application for title to a motor vehicle to be sworn or affirmed, we feel the indictment is invalid because it fails to allege what information on the application was false. G.S. 20-112 states that any person who knowingly swears or affirms falsely to an affidavit shall be guilty of perjury. The crime of perjury requires, among other things, that a false statement under oath be knowingly made. *State v. Chaney*, 256 N.C. 255, 123 S.E. 2d 498 (1962). G.S. 20-52 states that "every such application shall bear the signature of the owner . . . and said signature shall be acknowledged by the owner before a person authorized to administer oaths." While the indictment alleges that the application was sworn to, it fails to indicate the actual false statement made on the application.

Furthermore, G.S. 15A-924(a)(5) requires that a criminal pleading must contain "[a] plain and concise factual statement . . . which . . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." The trial court must dismiss the charge if the pleading fails in this respect. G.S. 15A-924(e). The defect must appear on the face of the record. *State v. Underwood*, 283 N.C. 154, 195 S.E. 2d 489 (1973); *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). It is plain on the face of this indictment that no factual statement was given which would put the defendant on notice as to what information placed on the application was allegedly false.

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We hold that the indictment did fail to charge a crime in its failure to relate what substantive material on the application for title was false, and that the charge was properly dismissed. G.S. 15A-954(a)(10). If it feels so advised, the State is free to seek a new and proper bill of indictment. See *State v. Callett*, 211 N.C. 563, 191 S.E. 27 (1937).

VI.

The results are: As to the defendant's appeal, no error; as to the State's appeal, affirmed.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. BETTY ANN CRONAUER

No. 8219DC1102

(Filed 20 December 1983)

Arrest and Bail § 11— appearance bond—improperly required—not binding

An appearance bond required by a district court in North Carolina, which was based on an extradition warrant from California, imposed terms and conditions beyond those authorized by the Uniform Extradition Act and, therefore, did not bind either principal or surety.

Chief Judge VAUGHN and Judge WHICHARD concurring.

APPEAL by defendant from *Montgomery, Judge*. Order entered 28 May 1982 in District Court, ROWAN County. Heard in the Court of Appeals 29 August 1983.

After defendant married Michael Cronauer, a widower, in California in 1977, his five minor children lived with them. A year later the entire family moved to North Carolina where they all lived together until May 20, 1980, when Cronauer was killed in an automobile accident. The five children continued to reside with defendant and on May 27, 1980, she was appointed guardian of each of the children by the Rowan County Clerk of Superior Court. On July 22, 1980, Jennifer Lynn Reese, the children's half-sister, secretly came to North Carolina and without defendant's knowledge took four of the five children to her home in Califor-

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nia, the other child, John Cronauer, remaining in North Carolina with defendant.

Mrs. Reese then went before the Orange County, California court and petitioned that she be appointed guardian for all five children. An interim order dated July 31, 1980 directed that the four children in California remain where they were and the child in North Carolina remain where he was until the application was acted upon. On November 26, 1980 the California court ruled that it had jurisdiction over the four children there, one of which was the child, Jody Lynn Cronauer, and appointed Mrs. Reese as their guardian. In February, 1981 defendant went to California and brought the child Jody Lynn Cronauer back to North Carolina with her without obtaining Mrs. Reese's permission.

On March 5, 1981, at the instance of Mrs. Reese, a felony warrant against defendant was issued by the California court. The warrant, in pertinent part, reads as follows:

"Complaint on oath having this day been laid before me that the crime of felony, to-wit: 278 PC has been committed, and accusing defendant BETTY ANN CRONAUER thereof, you are therefore commanded forthwith to arrest the above-named defendant and bring said defendant before me at the above-entitled court."

On March 11, 1981, a fugitive warrant based thereon was issued by the Rowan County District Court which, in pertinent part, reads as follows:

Based on the attached affidavit, the UNDERSIGNED FINDS THAT THERE IS PROBABLE CAUSE TO BELIEVE that:

(x) On or about the 24th day of February, 1981, the crime of Violation 278 California Penal Code was committed in the State of California, and that the defendant named above was charged in the criminal courts of Orange County, State of California, with the commission of that crime, and that since that time the defendant has fled from justice in that state and is now in the State of North Carolina and subject to arrest under the provisions of G.S. 15A-733.

YOU ARE DIRECTED TO ARREST THE DEFENDANT NAMED ABOVE AND BRING HIM WITHOUT UNNECESSARY DELAY BEFORE A JUDICIAL OFFICIAL TO ANSWER THE CHARGES SET OUT ABOVE.

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The affidavit referred to therein was as follows:

Lt. G. A. Sides, being duly sworn states that he has received:

(x) a copy of a (warrant) (indictment) from Orange County, State of California, which is attached; stating that the defendant named above has been (charged with) (convicted-of) the crime of Violation 278 California Penal Code in the State of California, which crime was committed on or about the 24th day of February, 1981.

The affiant further states that he has reasonable grounds to believe that:

(x) the defendant named above has fled from justice in that other state;

and that the affiant has reasonable grounds to believe that the defendant named above is now in the State of North Carolina and is subject to arrest under the provisions of G.S. 15A-733 and/or G.S. 15A-734.

The California Governor also sent an extradition request to the Governor of North Carolina, who, after investigation, denied it upon the grounds that it was a civil matter and North Carolina had prior jurisdiction of the child since defendant had been her duly appointed guardian.

Before the fugitive warrant was served on defendant, a motion to dismiss was submitted to the court March 23, 1981, but the court declined to hear it because the State would not consent thereto. Instead, the court continued the hearing until such time as "defendant Betty Ann Cronauer has submitted herself to this Court," with the proviso, however, that it "not be heard prior to trial without the consent of the State pursuant to G.S. 15A-953." Defendant submitted herself to the court March 26, 1981, but her motion to dismiss was not heard because the State still objected to it being heard before trial. The following orders were also entered that same day, presumably in sequence:

ORDER IN A FIRST APPEARANCE—G.S. 15A-601-606

[by Judge Grant]

It appearing to the Court that the above-named defendant was present in court and was informed of the charges

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against him/her, of his/her right to counsel, of his/her eligibility for release under Chapter 15A, Article 26—Bail, and of his/her right to remain silent. The Court further finds that the defendant was advised and fully understood his/her right to remain silent, his/her right to counsel and his/her eligibility or noneligibility for bail and the charges against him/her.

That G. Carlton, Attorney at Law, [was-waived] [was-appointed] [was privately employed] to represent the defendant.

That pursuant to 15A-606, this cause is set for a Probable Cause Hearing on the 6 day of April, 1981.

By consent, the State and attorney for defendant [defendant], this matter is set out [earlier than] [later than] the statutory [minimum] [maximum] period.

That witnesses who were present, the defendant, his/her attorney of record, were informed of the date of the Probable Cause Hearing.

RELEASE ORDER—FIRST APPEARANCE [By Magistrate Williams]

To the defendant named above:

You are ordered to appear before the District Court at Salisbury, N. C., on the 26 day of March, 1981, at 9:30 o'clock, A.m., and at all subsequent continued dates. If you fail to appear you will be arrested and may be imprisoned for as many as three years and fined as much as \$3,000.

Charge: Fugitive [sic] Warrant.

Your release is authorized upon your execution of: () Your WRITTEN PROMISE TO APPEAR, () Your UNSECURED BOND of \$_____, Your SECURED BOND of \$_____, () Your CUSTODY RELEASE TO _____. You will be arrested if you violate the following restrictions:

release, if any to be determined by the presiding District Court Judge.

This order supersedes all previous Release Orders.

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SUPPLEMENTAL RELEASE ORDERS [by Judge Grant]

The above Release Order is modified as follows:
\$10,000.00 secured bond

ORDER FOR COMMITMENT [by Magistrate Williams]

To the custodian of the Rowan County Detention Facility:

You are ordered to receive into your custody the above-named defendant who is charged as shown above and who may be released if authorized above.

If the defendant is not sooner released, you are ordered to:

() produce him in District Court _____ for (a first appearance) (trial) at _____ a.m. on the _____ day of _____, 19____.

() hold him for the following purpose: _____.

This order supplements all previous Orders for Commitment.

To avoid being committed defendant posted an appearance bond in the amount of \$10,000, as required by the court. When the probable cause hearing was held April 6, 1981, defendant did not appear and an order forfeiting the bond was entered. Defendant moved to vacate the forfeiture, but judgment absolute was rendered against the bond. After the Governor denied extradition, the State filed a dismissal as to the fugitive warrant, defendant then petitioned for a remittance of the bond, and an order remitting \$5,000 of the \$10,000 forfeiture was entered. The defendant appealed from the court's refusal to remit the entire amount.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Graham M. Carlton for defendant appellant.

PHILLIPS, Judge.

In our opinion the case against the defendant was a nullity from its inception and the bond required in connection therewith is of no greater force and therefore must be cancelled. The jurisdictional papers in the case—(the North Carolina fugitive warrant, fugitive affidavit, and California warrant attached to it,

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which, in effect, constitute "the warrant" for the purpose of this case)—were insufficient to justify the defendant's arrest, and defendant's motion to dismiss should have been granted upon defendant submitting herself to the court's jurisdiction.

In this state, before one can be lawfully arrested and detained under a warrant, it must allege all of the constituent elements of the crime sought to be charged. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). It must contain "a plain and concise factual statement" supporting every element of the alleged offense. G.S. 15A-924(5). Not only must the warrant, as required by rudimentary due process concepts, explicitly apprise the accused of the offense he is charged with committing so he will know how to answer and prepare his defense, but the averments also must be sufficient to enable the court to proceed to judgment, *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955), and to bar a subsequent prosecution for the same offense. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972). When another state's criminal law is involved, as is the case here, reasonable leeway commensurate therewith must be allowed the state in issuing and phrasing the arrest papers, and we do not hold that a fugitive warrant must be as full and detailed as a local warrant for a like offense. We do hold, however, that one charged with committing a crime elsewhere cannot be lawfully arrested and detained in this state under a warrant and its attachments that does not even identify the criminal acts that were allegedly committed.

The only information of consequence that the papers under which defendant was arrested and incarcerated conveyed to the court and the defendant was that her alleged crime violated "278 California Penal Code" and occurred "on or about the 24th day of February, 1981." None of the papers either stated generally what acts are made criminal by Section 278 of the California Penal Code or specifically what acts defendant allegedly committed in violation of it. The child Jody Lynn Cronauer was not even mentioned in the arrest papers. Indeed, the very first intimation in the record that the crime defendant allegedly committed consisted of taking the child Jody Lynn Cronauer away from the home of her California appointed guardian is contained in the defendant's petition to remit the bond forfeiture, which paper was filed March 5, 1982, fifty-one weeks after the warrant here was issued.

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G.S. 15A-954(a)(10) requires the court on motion of the defendant to dismiss a criminal pleading that fails to charge an offense in accord with our law. Upon the warrant's glaring deficiencies being called to the court's attention, it was obliged to dismiss the case and permit defendant to go her way; and, for the reasons discussed below, had no authority to schedule further hearings that were totally irrelevant to the extradition proceeding that defendant was involved in or to require her to post the type of bond that was given before being released from jail. The judge's assumption that under G.S. 15A-953 he was powerless to rule on the matter "before trial" unless the State consented thereto was mistaken. By its express terms, G.S. 15A-953 is limited to "misdemeanor prosecutions in the district court," whereas, this case involves a felony fugitive warrant; and under G.S. 15A-954(c), a motion to dismiss a criminal pleading because it fails to charge an offense can be made at any time.

The legal foundation for the bond required of defendant was also deficient in that it was not the type of bond that the court was authorized to require in the situation that existed. Since she was not charged with committing a crime in this state, the statutes that govern the processing of such charges had no application. The statutes that applied to defendant's situation are all contained in the Uniform Criminal Extradition Act; those particularly applicable are G.S. 15A-733, 735, 736, and 738. Since these statutes provided the only authority for arresting and detaining defendant in the first place, compliance with them was mandatory. Though the fugitive warrant stated that its authority was G.S. 15A-733 and 15A-734, its only authority was G.S. 15A-733, as G.S. 15A-734, by its terms, applies only to fugitives that are arrested *without* a warrant. Under G.S. 15A-733, a fugitive arrested with a warrant must be immediately taken before a judge or magistrate. Upon that being done, unless bail is allowed *pursuant to G.S. 15A-736*, G.S. 15A-735 requires that the judge or magistrate commit the fugitive to the county jail for a *specified time*, not exceeding thirty days, so as to enable the Governor to investigate and decide the extradition request. If bond is permitted, G.S. 15A-736 requires that it be "conditioned for his appearance before him *at a time specified* in such bond, and for his surrender, to be arrested upon the warrant of the Governor of this State." (Emphasis supplied.) G.S. 15A-738 authorizes the

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forfeiture of the bond if the fugitive so arrested "fails to appear and surrender himself according to the conditions of his bond." These mandatory procedures were not followed in this case; instead, the court undertook to process the case as though defendant had been charged with committing a crime in this state.

At the outset, the order declining to act on defendant's motion provided that "this matter may not be heard prior to trial without the consent of the State," though defendant, of course, faced no trial in court, but was there only to await the decision of the Governor. Immediately thereafter, the "First Appearance Order" was entered, stating that defendant was eligible for release "under Chapter 15A, Article 26—Bail," though the statutes in that Article (G.S. 15A-531, *et seq.*), as G.S. 15A-534 plainly shows, authorize only the *pretrial* release of those charged with violating our criminal laws, and have no application to extradition proceedings. The First Appearance Order also scheduled a probable cause hearing, an anomaly neither mentioned in nor authorized by the Uniform Criminal Extradition Act—under which the Governor rather than the court decides whether extradition is justified, and it is forbidden that the guilt or innocence of the accused be inquired into "except as it may be involved in identifying the person held." G.S. 15A-740. The Release Order, which was modified only by the \$10,000 bond requirement, directed her to appear before the District Court that same day, March 26, 1981, and "at all subsequent continued dates." And the bond was indistinguishable from the bonds that are routinely given by those facing criminal trials in this state; instead of being conditioned for her appearance at a time specified for surrender to the Governor, as G.S. 15A-736 required, it was conditioned as follows:

CONDITIONS

- (x) Pretrial Release—The conditions of this bond are that the above named defendant shall appear in the above entitled action whenever required and will at all times render himself amenable to the orders and processes of the Court. It is agreed and understood that this bond is effective and binding upon the obligors throughout all stages of the proceedings in the trial divisions of the General Court of Justice until the entry of judgment in the dis-

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strict court from which no appeal is taken or until the entry of judgment in the superior court.

Clearly, the bail bond given by defendant was without statutory authority. Under our law, a bail bond taken without proper authority is void and binds neither principal nor surety. *State v. Bowser*, 232 N.C. 414, 61 S.E. 2d 98 (1950).

The order appealed from is reversed and upon remand the District Court will enter an order remitting the remainder of defendant's bond.

Reversed and remanded.

Chief Judge VAUGHN and Judge WHICHARD concur.

Chief Judge VAUGHN and Judge WHICHARD concurring.

We concur only in that part of the opinion holding that the bond required by the court imposed terms and conditions beyond those authorized by the Uniform Extradition Act and, therefore, did not bind either principal or surety. We agree that the Order should be reversed and the case remanded for an Order remitting the remainder of defendant's bond.

GREGORY E. SPRATT v. DUKE POWER COMPANY

No. 8210IC1000

(Filed 20 December 1983)

Master and Servant § 60.3— workers' compensation—injury while seeking chewing gum—breach of rule against running—entitlement to compensation

Injuries suffered by plaintiff when he slipped on accumulated coal dust on the floor of defendant power company's plant while running back to the plant canteen after a meal break to get a pack of chewing gum arose out of and in the course of his employment, notwithstanding plaintiff knew that the employer's rules prohibited running inside the plant, since the trip to the canteen was undertaken for the personal comfort of the plaintiff; running was not so abnormally dangerous, unconventional or unusual a manner of proceeding to the canteen for chewing gum as to take plaintiff's conduct outside the course and scope of his employment; and plaintiff's disobedience of the rule against running was not sufficient to break the causal connection between the injury

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and the employment, especially in view of the fact that plaintiff was not violating an immediate and direct order of a then present superior. G.S. 97-2(6).

APPEAL by defendant from an order of the North Carolina Industrial Commission entered 29 July 1982. Heard in the Court of Appeals 24 August 1983.

Defendant, Duke Power Company, appeals from the award of Workers' Compensation benefits by the Full Commission for injuries plaintiff Spratt suffered when he slipped on accumulated coal dust on the floor of defendant's power plant while running back to the plant canteen after a meal break to get a pack of chewing gum.

W. Edward Poe, Jr., Assistant General Counsel, Duke Power Company, for defendant appellant.

Davis & Corriher, by James A. Corriher, for plaintiff appellee.

JOHNSON, Judge.

The question presented for review is whether the Industrial Commission correctly found and concluded that Gregory Spratt's injury by accident arose out of and in the course of his employment. For the reasons set forth below, we answer the question in the affirmative.

The only injury which is compensable under the Workers' Compensation Act is an injury "by accident arising out of and in the course of the employment." G.S. 97-2(6). The determination of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and the appellate court may review the record to determine if the findings and conclusions of the Industrial Commission are supported by sufficient evidence. G.S. 97-86; *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977).

The uncontradicted evidence tended to show that the 25 year old plaintiff, Gregory Spratt, had been employed for approximately four years as a set (or utility) operator by and at defendant Duke Power Company's Buck Steam (power) Station. Plaintiff worked during the third shift, from 11:00 p.m. to 7:00 a.m. On 18

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April 1981, plaintiff reported to work at about 11:00 p.m. When he arrived, the other employees were in the process of shutting the unit down. Plaintiff performed various duties until 1:30 a.m., including changing a chart on the precipitator panel in the control room, locking up the precipitators, dumping ashes out of the boilers and cooling the boilers down. Plaintiff's trip to the control room in the main area of the plant took him across the same area where he later fell. The floor was a terrazzo material, but at the precipitator panel the floor changed to a grating. The grating extends back toward the rear of the station where the canteen is located.

At about 1:30 a.m. on 19 April 1981, plaintiff met some co-workers and went to the canteen, also referred to as the "bellywasher," for dinner. After finishing dinner, plaintiff returned to work and went first to the control room, then to get a drink from the lobby water fountain, and then he decided to go back to the canteen to purchase some chewing gum. He went through the double doors separating the lobby area from the main area of the plant, and started running across the terrazzo floor toward the canteen on a path that took him by the precipitator panel. As he ran, plaintiff slipped on coal dust that had accumulated, probably resulting from a coal leak, on the floor. He started falling and struck and injured his left knee and left hand on the floor grating.

Plaintiff knew that station rules prohibited running inside the plant. He offered no reason to explain why he was running on this occasion. Plaintiff admitted on cross-examination that he used to run track in high school, and that he ran on this particular occasion out of "force of habit." Plaintiff's shift supervisor, O. R. Edwards, testified that although he was not present at the time of plaintiff's accident, he had previously warned all the employees, including plaintiff, not to run on numerous occasions and that he had in the past seen plaintiff running and stopped him.

On these facts, Deputy Commissioner Shuping issued an opinion and award dated 9 March 1982, in which he ruled that Mr. Spratt's accident did not arise out of and in the course of his employment because his running was in violation of his employer's safety rule. The Deputy Commissioner made a Finding of Fact [No. 1] reflecting the foregoing evidence and, in addition, the following pertinent Finding of Fact:

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2. Despite the defendant-employer having previously adopted a safety rule (and/or regulation) which specifically forbade running, under any circumstances, within the business premises and of which he was not only aware but for prior violation(s) of which he, as well as other co-employees, had been reprimanded by the defendant-employer; claimant for reasons personal to himself and which borne [sic] no reasonable relationship, either directly or indirectly, to the furtherance of his master's business, elected to run to the canteen on this occasion, despite the fact that he was likewise aware, as a result of having walked through this same area earlier during the shift, of the presence of accumulated coal dust on the terrazzo flooring thereof. Therefore, in light of the foregoing, the method, and more particularly, the running fashion, by which he attempted to satisfy his personal comfort needs on this occasion, was unreasonable.

Based upon his Findings of Fact, the Deputy Commissioner concluded, as a matter of law, as follows:

On 19 April 1981 plaintiff sustained an injury by accident; however, the same did not arise out of and in the course of his employment, in that the activity in which he was then engaged and which resulted in such injury; to wit, running within the defendant-employer's premises, had been specifically forbidden by his employer and (such activity) was not calculated, either directly or indirectly, to further his master's business, but rather was adopted by the claimant solely for the purpose of satisfying his own personal comfort or convenience and was, in consideration of the known hazards, an unreasonable manner (or method) of doing so. G.S. 97-2(6); Larson, Workers' [sic] Compensation Law, Section 21.80 *et seq.*, Section 31.12; *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938); *Martin v. Bonclarken Assembly*, 296 N.C. 540, 251 S.E. 2d 403 (1979).

On 29 July 1982, the Full Commission issued an opinion and award reversing the Deputy Commissioner's decision, stating that,

The Full Commission has carefully considered the record in its entirety, particularly in light of the decision of the Supreme Court filed July 13, 1982 in the case of *Hoyle v.*

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Brick & Tile Company. The Full Commission is of the opinion that the decision of the Hearing Commissioner cannot be affirmed.

The Full Commission then adopted the Deputy Commissioner's Findings of Fact Nos. 1 and 2, vacated and set aside the balance of the decision, and inserted in lieu thereof the following:

FINDING OF FACT

3. At the time complained of, plaintiff was not violating a direct, immediate, and specific order by a then present superior. His accident, therefore, arose out of and in the course of his employment.

Based upon the foregoing Findings of Fact, the Full Commission made the following Conclusion of Law:

The Supreme Court, in the case of *Hoyle v. Isenhour Brick & Tile Company, supra*, held to bar recovery it must be shown that an employee is "disobeying a direct, immediate, and specific order by a then present superior." We cannot find that this is true in the case *sub judice*. We therefore hold that the accident arose out of and in the course of the employment.

The defendant contends that the Full Commission erred in reversing the Deputy Commissioner on the basis of the Supreme Court's decision in *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 293 S.E. 2d 196 (1982). Although we agree with defendant that *Hoyle* presents a slightly different factual situation than that presented by plaintiff Spratt's claim, we are, nevertheless, of the opinion that the Full Commission reached the correct conclusion in awarding plaintiff benefits for his accidental injury.

In *Hoyle* the deceased employee was employed as a cull brick stacker. He removed imperfect bricks from a conveyor and stacked them. A forklift operator then removed the culls. The employer had a rule against unauthorized personnel operating forklifts and Hoyle was not so authorized. On two occasions prior to the accident, Hoyle was observed by supervisors using a forklift and reprimanded.

On the night of the accident, Hoyle had stacked culls until he had no more space to put them. The authorized forklift operator,

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who was busy helping another employee, told Hoyle that he could use the forklift to move the culls. After loading the stack of cull bricks, Hoyle moved away from his work station in the forklift. He was later found pinned under the overturned forklift. The Deputy Commissioner's denial of benefits was upheld by the Full Commission.

On appeal, this Court in a 2-1 decision¹ held that Hoyle's operation of the forklift, after prior warnings and in the face of rules against the practice, constituted a departure from the job for which he had been employed, and affirmed the award denying benefits. Judge (now Justice) Harry C. Martin dissented on the grounds that at the time of the accident, Hoyle was attempting to get his own work done, although in a forbidden fashion, and therefore his actions did not break the causal connection between his employment and his death.

The Supreme Court in a 4-3 decision followed Judge Martin's reasoning and reversed this Court's decision. Writing for the majority, Chief Justice Branch first stated the general rules governing compensable injuries resulting from accidents "arising out of and in the course of the employment."

The term "arising out of" refers to the origin or cause of the accident, and the term "in the course of" refers to the time, place, and circumstances of the accident . . .

306 N.C. at 251, 293 S.E. 2d at 198.

In reaching its ultimate conclusion that Hoyle's disobedience of his employer's rule was not such a departure from his employment as to destroy the causal connection between the accident and the employment, the Supreme Court analyzed a number of its prior opinions in similar cases of employee disobedience. The court distinguished *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938) (benefits denied where deceased had disobeyed his orders and exceeded the scope of his employment by act of hazardous thrill seeking bearing no conceivable relation to accomplishment of job), *Morrow v. Highway Commission*, 214 N.C. 835, 199 S.E. 265 (1938) (bridge painter's disobedience of a direct

1. *Hoyle v. Isenhour Brick and Tile Co.*, 55 N.C. App. 675, 286 S.E. 2d 830 (1982).

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and specific order by a then present superior not to jump into the river to retrieve a fallen paintbrush breaks the causal relation between the employment and the resulting injury) and *Taylor v. Dixon*, 251 N.C. 304, 111 S.E. 2d 181 (1959) (Industrial Commission erred by failing to make findings of fact with respect to employer's defense that employee, who was hired to operate a chain saw and was injured while operating a tractor in defiance of a direct order, had not merely deviated from the specified *method* of working but had substantially departed from the *ultimate work* for which he was employed). These cases were considered representative of the older view that acts outside the employee's job description are outside the scope of employment, particularly in the face of a superior's direct and immediate order not to engage in the prohibited activity. In *Teague* and *Taylor* the *activity* engaged in was considered to be outside the scope of employment. In *Morrow*, the *manner* or *method* of going about the assigned task was considered so abnormally dangerous and unreasonable as to break the causal connection. Thus, in the three cases the injury could not be considered as arising out of the scope of the employment.

In contrast to that older line of cases, the *Hoyle* majority relied upon, "the more recent cases [which] have not viewed minor deviations from the confines of a narrow job description as an absolute bar to the recovery of benefits, even when such acts were contrary to stated rules or to specific instructions of the employer where such acts were reasonably related to the accomplishment of the task for which the employee was hired." 306 N.C. at 254, 293 S.E. 2d at 200. Of these cases, two involved specifically prohibited job activities. *Riddick v. Cedar Works*, 227 N.C. 647, 43 S.E. 2d 850 (1947) (lumber stacker warned to stay away from saws in employer's lumber plant compensated for injuries sustained when he attempted to help co-employee saw a board) and *Parsons v. Swift & Co.*, 234 N.C. 580, 68 S.E. 2d 296 (1951) (wheelbarrow hauler who was prohibited by company rule from operating a tractor, entitled to death benefits when he was killed in attempting to move a tractor blocking his path). The four other cases involved specifically prohibited methods of accomplishing the employee's assigned work duties. *Hartley v. Prison Dept.*, 258 N.C. 287, 128 S.E. 2d 598 (1962) (prison guard compensated for injuries sustained when he, contrary to prison

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rules, climbed the fence rather than walk around through the gate to relieve another guard in a nearby tower); *Hensley v. Carswell Action Committee*, 296 N.C. 527, 251 S.E. 2d 399 (1979) (deceased youth hired to cut weeds around a lake compensated for accidental drowning occurring when he, contrary to instructions, attempted to wade across the lake to cut weeds he had missed); *Archie v. Lumber Co.*, 222 N.C. 477, 23 S.E. 2d 834 (1943) (deceased logger entitled to compensation for mortal injuries sustained when he, contrary to company rules, attempted to board a log car to ride from the work site along the company's railroad line back to camp); *Howell v. Fuel Co.*, 226 N.C. 730, 40 S.E. 2d 197 (1946) (deceased coal car sweeper who was injured when he stood on unprotected portion of railway platform waiting for a car to be moved entitled to compensation despite instruction to stand only in a specified place of safety).

The court then cited *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955), for the following proposition:

Basically, whether plaintiff's claim is compensable turns upon whether the employee acts for the benefit of his employer *to any appreciable extent* or whether the employee acts solely for his own benefit or that of a third person. (Emphasis added.)

The legal principles gleaned from the foregoing cases were summarized as follows:

[W]e find that thrill seeking which bears no conceivable relation to accomplishing the job for which the employee was hired moves the employee from the scope of his employment . . . Likewise, disobedience of a direct and specific order by a then present superior breaks the causal relation between the employment and the resulting injury . . . This is patently so; the employee's subjective belief concerning the advisability of his course of action becomes irrelevant since there would be no room for doubt as how best to serve his employer's interest in the face of the employer's direct and immediate order. Conversely, when there is a rule or a prior order and the employee is faced with a choice of remaining idle in compliance with the rule or order or continuing to further his employer's business, no superior being present, the employer who would reap the benefits of the employee's acts if suc-

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cessfully completed should bear the burden of injury resulting from such acts. Under such circumstances, engaging in an activity which is outside the narrow confines of the employee's job description, but which is reasonably related to the accomplishment of the task for which the employee was hired, does not ordinarily constitute a departure from the scope of employment.

306 N.C. at 259, 293 S.E. 2d at 202-203. Applying these general rules to the facts before it, the *Hoyle* court concluded:

[T]he evidence shows that [the] employee was faced with the choice of abandoning the furtherance of his employer's business or acting in contravention of a previous order. There was no superior present to forbid or permit his operation of the forklift. We are therefore of the opinion that employee's election to disobey a prior given order did not break the causal connection between his employment and his fatal injury if the disobedient act was reasonably related to the accomplishment of the task for which he was hired.

Thus, the majority concluded that benefits should be awarded under the Act where the injured employee was acting in furtherance of his employer's business to any appreciable extent, albeit in disobedience of the employer's established rules or order, and the injury did not arise while the employee was either thrill seeking or disobeying a direct order, by a then present superior, not to undertake an unreasonably dangerous or wholly unrelated job activity. The former activity was considered entirely outside the course and scope of employment, while the latter activities were considered to be such substantial deviations as to break the causal connection between the injury and the employment so that the accident could not be said to have arisen out of the scope of the employment. Therefore, the doctrine announced in *Hoyle*, that mere disobedience of a *standing* rule or order of the employer does not automatically bar compensation, may be seen to apply to both prohibited unrelated job activities and prohibited methods of accomplishing assigned work duties in those cases where it nevertheless may be said that the employee has sustained a work-related injury by accident. In other words, if compensation would otherwise be warranted under general principles of law relating to industrial accidents, it will not be defeated by violation of prior safety rules of the employer.

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Defendant argues that in reversing the Deputy Commissioner's award denying benefits in this case, the Full Commission erred by relying solely on that portion of the *Hoyle* opinion dealing with the absence of a then present superior whose direct, immediate and specific order the injured employee violated. Defendant argues that an employer cannot reasonably be expected to have a supervisor present at all times, and that even had he done so, "the foreman certainly could not have anticipated that Spratt would suddenly sprint across the terrazzo floor toward the rear of the plant to purchase a pack of gum and warn him not to do so. Thus, it is easily seen that reliance on the 'violation of an order by a then present supervisor' argument is an absurd reason for awarding benefits on the facts of this case." Defendant argues further that a close and fair reading of *Hoyle* reveals that benefits under the Act were awarded primarily because Hoyle was engaged in doing his master's work at the time he was killed—not because Hoyle's supervisor was not present on the scene at the time to forbid or permit operation of the forklift. It is defendant's contention that *Hoyle* is distinguishable because plaintiff was not engaged in his duties as a utility operator at the time of his accident, but was undertaking a purely personal errand in an unsafe and prohibited manner and, therefore, that compensation should be denied notwithstanding the fact that plaintiff was not disobeying a direct, immediate and specific order by a then present superior.

We agree with defendant that the narrow aspect of *Hoyle* relied upon by the Full Commission, and excepted to by the defendant, is not dispositive of the case *sub judice*. However, we find defendant's reading of *Hoyle* to be too restrictive. Although the court was evidently unwilling to overrule the earlier cases of, for example, *Teague v. Atlantic Co.*, *supra* and *Morrow v. Highway Commission*, *supra*, the broad principle repeatedly stressed throughout the *Hoyle* opinion is that the employee's violation of a safety rule does not of itself constitute a bar to recovery of compensation where it may be determined that his injury arose in the course of the employment. *Hartley v. Prison Dept.*, *supra* was cited for the proposition that, "'not even gross negligence is a defense to a compensation claim.' *Id.* at 289, 128 S.E. 2d at 600 . . . 'Only intoxication or injury intentionally inflicted will defeat a claim,' *id.*, and . . . even the willful violation

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of an employer's rule does not defeat compensation, but may result in a ten percent reduction if the rule has been approved by the Industrial Commission. G.S. 97-12." 306 N.C. at 256, 293 S.E. 2d at 201. The *Hoyle* court also stated that, "the purpose of the Workers' Compensation Act was 'to eliminate the fault of the workman as a basis for denying recovery.'" *Id.*, quoting *Hartley v. Prison Dept.*, *supra* at 290, 128 S.E. 2d at 600.

Similarly, the court characterized the decision in *Archie v. Lumber Co.*, *supra* as providing "the definitive answer to the question of whether prior orders or rules of the employer may constitute an absolute bar to the recovery of compensation." (Emphasis added.) 306 N.C. at 257, 293 S.E. 2d at 201. In *Archie*, the claimant was not denied compensation "because he made an error of judgment and attempted to use a more hazardous means of transportation [the log train as opposed to an enclosed car], likewise under the control of the defendant, nor because in so doing he violated a rule which was not always observed by the employees." 222 N.C. at 481, 23 S.E. 2d at 836. Rather, the court stated that the *only provision* made by the Act with regard to an injury caused by, *inter alia*, the willful breach of a rule or regulation adopted by the employer and approved by the Industrial Commission, is to require that his compensation be reduced by ten percent. *Id.* The court also expressly disapproved cases from other jurisdictions holding to the contrary as not in accord with the "proper interpretation" of the North Carolina Workers' Compensation Act.

The *Hoyle* court summarized the rule concerning the violation of employer safety rules as follows:

It is neither the role of the Industrial Commission nor of this Court to enforce the employer's rules or orders by the denial of Workers' Compensation. Enforcement of rules and orders is the responsibility of the employer, who may choose to terminate employment or otherwise discipline disobedient employees. This Court will not do indirectly what the employer failed to do directly.

306 N.C. at 260, 293 S.E. 2d at 203.

Thus, the *Hoyle* court's reasoning indicates that compensation for an injury by accident arising out of and in the course of

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employment is not to be denied simply because the employee violated a safety regulation or rule. Had plaintiff Spratt slipped on coal dust while running to control a coal flow, compensation would be properly awardable under *Hoyle*. The question then becomes, is it to be denied merely because plaintiff so slipped when he impulsively ran back to the canteen for a package of chewing gum? We answer the question in the negative.

The phrase "in the course of employment" refers to the time, place and circumstances of the accident. *Clark v. Burton Lines*, 272 N.C. 433, 158 S.E. 2d 569 (1968). With respect to time, the course of employment includes the work period and any intervals during the period for rest and refreshment. *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E. 2d 97 (1946). With respect to place, the course of employment includes the premises of the employer. *Harless v. Flynn*, 1 N.C. App. 448, 162 S.E. 2d 47 (1968).

Plaintiff's accident occurred on the defendant employer's premises during plaintiff's scheduled work period. The fact that plaintiff was taking a break for a drink of water and some refreshment would not take the accident out of the course of employment since such intervals are included under *Rewis v. Insurance Co.*, *supra*. See also *Williams v. Hydro Print, Inc.*, 65 N.C. App. 1, --- S.E. 2d --- (1983) (injury by accident occurring during regular rest break when employee started running in the plant backyard and tripped over the railroad track running through it arises out of and in the course of employment).

With respect to circumstances, injuries sustained while an employee is engaged in an activity which is calculated to further, *directly* or *indirectly*, the employer's business is within the course of employment. *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643 (1964). The fact that the employee is not engaged in the actual performance of the duties of the job does not preclude an accident from being one within the course of employment. *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E. 2d 320 (1944) (accident occurring when a watchman returning to the washroom for his flashlight was pushed aside by fellow employee in a hurry arose in the course of employment).

Activities which are undertaken for the personal comfort of the employee are considered part of the "circumstances" element

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of the course of employment. The doctrine is clearly stated in *Rewis v. Insurance Co.*, *supra*, at 328, 38 S.E. 2d at 99, as follows:

An employee, while about his employer's business, may do those things which are necessary to his own health and comfort, even though personal to himself, and such acts are regarded as incidental to the employment . . . "Such acts are as necessary to the life, comfort and convenience of the workman while at work, though personal to himself, and not technically acts of service, are incidental to the service; and an accident occurring in the performance of such acts is deemed to have arisen out of the employment. Such acts are regarded as inevitable incidents of the employment, and accidents happening in the performance of such acts are regarded as arising out of and in the course of employment." (Citations omitted.)

The courts of this state have held that a broad range of activities fit into the personal comfort doctrine, including a visit to the washroom, *Rewis v. Insurance Co.*, *supra*; a smoke break, *Fox v. Mills, Inc.*, 225 N.C. 580, 35 S.E. 2d 869 (1945); a break to partake of refreshment, *Pickard v. Plaid Mills*, 213 N.C. 28, 195 S.E. 28 (1938); and a personal errand involving a temporary absence from the employee's post of duty, *Bellamy v. Manufacturing Co.*, 200 N.C. 676, 158 S.E. 246 (1931).

At the time plaintiff sustained his injury, he was on his way to the station canteen in order to purchase a pack of chewing gum. This activity falls within the broad parameters of the personal comfort doctrine since purchasing gum involves plaintiff's comfort, health or convenience on the job. This conclusion is reflected in the Deputy Commissioner's finding that plaintiff was attempting to satisfy his personal comfort needs at the time he slipped and fell. However, the Deputy Commissioner concluded as a matter of law, and the defendant argues on appeal, that the injury was not compensable because by running, the plaintiff violated a company rule and chose an unreasonable manner or method of tending to his personal comfort.

In *Hoyle v. Isenhour Brick & Tile Co.*, *supra* the Supreme Court articulated a strong policy under the Act that compensation not be denied on the basis of the violation of a safety rule *alone*. Therefore, whether compensation is to be denied because

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the plaintiff chose an *unreasonable manner* of seeking his personal comfort becomes a distinct issue for resolution in this case.

The general rule as to personal comfort is stated in 1A Larson, *The Law of Workmen's Compensation*, § 21.00, p. 5-4 (1982) as follows:

Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the extent of the departure is so great that an intent to abandon the job temporarily may be inferred, or unless, in some jurisdictions, the method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.

Professor Larson explains that the question of whether the *manner* of seeking personal comfort may disqualify it because the method chosen is unreasonably dangerous or unconventional is a mixed question of "arising" and "course." Larson, *supra*, § 21.10. Further, that some jurisdictions hold that use of a prohibited method of seeking personal comfort is fatal to coverage of such acts because they are already only indirectly related to the employment, although a similar violation of instructions would be immaterial as to some act in direct accomplishment of the work. See § 21.80 *et seq.* and § 31.12.

We note that the cases Professor Larson cites as examples of the application of this rule denying compensation for injuries sustained in the performance of acts incidental to the employment are all older cases, involving personal comfort *activities* that were themselves expressly prohibited. § 31.12. Plaintiff's case involves only the *manner* of his seeking comfort. We conclude that running was not so abnormally dangerous, unconventional or unusual a manner of proceeding to the canteen for chewing gum as to take his conduct outside the course and scope of his employment. The testimony before the Deputy Commissioner reveals that running must have been a fairly common practice in the station because the employees were constantly being reprimanded for running. Nor does the fact that running was prohibited mandate a denial of benefits, as it would be contrary to the general principles of law established in *Hoyle*, and discussed earlier in this opinion.

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This Court, in *Harless v. Flynn, supra*, cited the following pertinent general rules with respect to the "arising out of employment" requirement:

The phrase *arising out of* has reference to the origin or cause of the accident . . . But this is not to say that the accident must have been caused by the employment. "Taking the words themselves, one is first struck by the fact that in the 'arising' phrase, the function of employment is passive while in the 'caused by' phrase it is active. When one speaks of an event 'arising out of employment,' the initiative, the moving force, is something other than the employment; the employment is thought of more as a condition out of which the event arises than as the force producing the event in affirmative fashion." 1 Larson, *Workmen's Compensation Law*, § 6.50, p. 45. The North Carolina Supreme Court has similarly stated the connection between the employment and the accident: "Where any reasonable relationship to the employment exists or employment is a contributory cause, the Court is justified in upholding the award as 'arising out of employment.'" (Citation omitted.)

* * *

An injury arises out of the employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein (citation omitted). For an accident to arise out of the employment, there must be some causal connection between the injury and the employment. When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it doesn't arise out of the employment.

1 N.C. App. at 455, 162 S.E. 2d at 52.

The Deputy Commissioner implicitly found, and the Full Commission adopted as a fact, that plaintiff's accident was a consequence of the presence of coal dust which had accumulated on the terrazzo flooring where plaintiff slipped and fell. Plaintiff testified

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that the accumulation was probably caused by a coal leak. Defendant is engaged in the business of generating electrical power and the use of coal is indispensable to its business. The risk of slipping and falling on coal dust is particular to plaintiff's employment in a power plant. The hazard of slipping on coal dust accumulated by reason of a coal leak on the workplace floor is not a hazard to which plaintiff would have been equally exposed apart from his employment at the Buck Steam Station. "Where any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.'" *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E. 2d 476, 479 (1960). Plaintiff's employment may therefore be considered a *contributory cause* of the accident and his injuries reasonably related to that employment, since his injury occurred while he was engaged in an activity that may be said to indirectly benefit his employer.

We are unable to conclude that plaintiff's disobedience of the prohibition against running in the Steam Station was sufficient to break the causal connection between the injury and the employment, especially in view of the fact that plaintiff was not violating an immediate and direct order of a then present superior. Therefore, plaintiff's injury by accident arose out of and in the course of his employment and the Full Commission's opinion and award of compensation is

Affirmed.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY WILLIAMS

No. 839SC131

(Filed 20 December 1983)

Criminal Law § 23.1— acceptance of negotiated guilty plea—failure to inform defendant of statutory matters—absence of finding that plea was voluntary—harmless error

The trial court's violation of G.S. 15A-1022 and defendant's constitutional rights by accepting defendant's negotiated plea of guilty without personally

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addressing defendant and advising him of the matters set forth in G.S. 15A-1022 and without making an affirmative finding that his plea was voluntarily and intelligently entered constituted harmless error beyond a reasonable doubt. G.S. 15A-1026.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 11 August 1982 in Superior Court, VANCE County. Heard in the Court of Appeals 18 October 1983.

Attorney General Edmisten by Assistant Attorney General John C. Daniel, Jr., for the State.

Edmundson & Catherwood by John W. Watson, Jr., and Robert K. Catherwood for defendant appellant.

BRASWELL, Judge.

What is error? Does the failure to scrupulously follow statutory procedure when taking a guilty plea automatically entitle the defendant to a new trial or other relief? Can a plea of guilty be tied down in a box that is secured with only one color of cord? When is error to be deemed prejudicial and reversible or harmless and upheld?

In his book "The Judicial Process" Judge Ruggero J. Aldisert commented that "[a] reviewing court's function is to determine whether a trial court committed error of sufficient magnitude to require that its judgment be reversed or vacated." R. Aldisert, "The Judicial Process" at 706 (1976). As expressed long ago in *Cherry v. Davis*, 59 Ga. 454, 456 (1877), "Wrong directions which do not put the traveler out of his way, furnish no reasons for repeating the journey." These views show a growth in the law from a rule that any error compels automatic reversal "to encompass a rule tolerating 'harmless error.'" Aldisert, *supra* at 717.

In the case before us a negotiated plea of guilty to three counts of felonious breaking or entering and larceny resulted in the defendant receiving an active sentence of imprisonment of six years. The six years ran together with a three-year sentence imposed at the same term of court following a jury conviction in a related felonious breaking or entering case. Defendant's counsel for trial and on appeal are members of the same privately-employed law firm.

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In the course of the acceptance by the court of the negotiated pleas of guilty the trial judge did not personally talk with the defendant concerning the matters covered in G.S. 15A-1022. In a superior court it is error for a trial judge in the process of accepting a plea of guilty not to:

- (1) address the defendant personally,
- (2) inform him of his right to remain silent,
- (3) determine that the defendant understands the nature of the charge,
- (4) inform him of his right to plead not guilty,
- (5) inform him that the guilty plea waives his right to a trial by jury and to be confronted by witnesses against him,
- (6) determine if he is satisfied with his representation by counsel, and
- (7) inform him of maximum and mandatory minimum sentence consequences, including the maximum possible from consecutive sentences. G.S. 15A-1022(a).

Under section (b) of the same statute, the judge is required to inquire of the prosecutor, the defense counsel, and the defendant personally whether there were any prior plea discussions and what the terms were of the plea arrangement, and whether any improper pressure had been exerted to induce the plea arrangement. Also, "[t]he judge may not accept a plea of guilty . . . from a defendant without first determining that the plea is a product of informed choice." G.S. 15A-1022(b). A violation of section (b) is error. *See also State v. Bush*, 307 N.C. 152, 167, 297 S.E. 2d 563, 573 (1982).

Another pertinent statute is G.S. 15A-1026 which requires a verbatim record of the proceeding at which the guilty plea is entered. "This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses." *Id.* When plea arrangements are not in writing, "the judge must require that the terms of the arrangement be stated for the record and that the assent of the defendant, his counsel, and the prosecutor be recorded." *Id.* Here, the court reporter did make a verbatim record of the guilty plea

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and sentencing proceedings and they are a part of the record before us.

Defendant petitioned this court pursuant to G.S. 15A-1444(e) for a writ of certiorari on 1 November 1982 to review the judgment of 11 August 1982 of Trial Judge James H. Pou Bailey. Certiorari was allowed on 17 November 1982.

In the companion case, Vance County Superior Court No. 82CRS2611, the defendant appealed to this Court his jury conviction of felonious breaking or entering of the Medical Arts Pharmacy. A different panel of judges has now heard that appeal and has entered its opinion finding no error. *State v. Williams*, 65 N.C. App. 383, --- S.E. 2d --- (filed 6 December 1983). In that case the sentence on 11 August 1982 was for the presumptive term of three years. It is that case with which the sentences in these negotiated pleas of guilty run concurrently.

The rest of the story is as follows: The defendant Williams and two codefendants were charged with breaking or entering and larceny of two lakeside cabins at Kerr Lake, breaking or entering and larceny of the office of Dr. P. R. Reddy, and breaking or entering and larceny of the Medical Arts Pharmacy. On Williams' motion the cases and codefendants were severed for trial. Williams was tried separately for the charge of breaking or entering of the Medical Arts Pharmacy and found guilty by the jury. The State had dismissed the larceny count. The two codefendants testified against Williams.

After the discharge of the jury and a recess, the court took up the matter of sentencing in the just completed Medical Arts Pharmacy case. During general comments made by court, prosecutor, and defense counsel concerning an appropriate sentence in the jury verdict case, the prosecutor indicated for the first time that the State would probably try the defendant "on at least two other charges." When the court subsequently inquired whether "[t]he evidence is going to be about the same," defense counsel replied, "Yes, sir, it would be, the evidence would be." This discussion came after the court had said the defendant had charges of breaking, entering, and larceny pending in three other cases and that he assumed that these charges probably concerned "the doctor's office and the two cabins." Defense counsel replied, "Yes, sir, that is correct." [The recitation of the evidence in *State*

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v. Williams, supra (filed 6 December 1983), refers to the present case before us and discloses that the defendant was cross-examined about these same charges.]

Mr. Waters, the District Attorney, was heard on a suggestion. He asked for the defendant to be placed "in custody during the evening and give [defense counsel] an opportunity to discuss with us the other charges, and perhaps with his client we may be able to present some other proposal to the Court in the morning." Although Mr. Edmundson indicated that he thought he could report back to the court "this afternoon" by 5:00, the judge allowed the parties an overnight recess.

At 9:30 a.m., 11 August 1982, the following morning the defendant and all counsel were present in open court. After an unrecorded bench conference with the District Attorney and defense counsel, the sentence proceeding resumed. We now copy verbatim from the record the remainder of the proceedings so that they will appear in context. Mr. Baskerville is the Assistant District Attorney who prosecuted the case; Mr. Edmundson is the defense counsel. The quotation begins after the mention by the court of the docket number in which the jury verdict was delivered.

MR. BASKERVILLE: That is correct, Your Honor. And Mr. Edmundson and myself have entered into negotiations whereby the defendant is to plead guilty to the remaining charges on the docket, Your Honor, and would receive a six year sentence.

THE COURT: I have agreed to that already. Anything more you wanted to say about it, Mr. Edmundson?

EXCEPTION NO. 1.

MR. EDMUNDSON: Your Honor, as I related to the Court yesterday, this defendant was involved in an automobile accident. At the time he suffered right apparently some serious brain damage, and I have an out-patient report from Duke University Medical Center Out-Patient Department, and I would propose to ask the Court to allow this to go along with his commitment papers.

THE COURT: I will be glad to do that.

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MR. EDMUNDSON: So that he can receive treatment.

THE COURT: I will be glad to do that, and ask that it be attached to the one that goes to the Department of Corrections.

MR. EDMUNDSON: Shall I give it to you?

THE COURT: Just give it to the Clerk. That will be fine. Whichever copy goes to the Department of Corrections, you just attach it. You better run off some copies and attach it to all commitments.

Anything more, Mr. Edmundson?

MR. EDMUNDSON: No, sir, that's it.

THE COURT: All right, let him stand up. In Case Number 82 CRS 2608, the defendant having been found guilty of breaking and entering by a jury, the judgment of the Court is that the defendant be confined in the custody of the Department of Correction of the State of North Carolina for a term of three years. That is the presumptive sentence.

And in Case Number 82 CRS 2609, the defendant having entered a plea of guilty to breaking and entering and larceny, the judgment of the Court is that the defendant be confined the custody of the Department of Corrections of the State of North Carolina for a term of three years, to commence at the expiration of the sentence imposed in 82 CRS 2608. That also is the presumptive sentence, and it is also entered as a part of a negotiated plea, which should show.

EXCEPTION NO. 2.

In Cases Number 82 CRS 2610 and 82 CRS 2611, that all counts be consolidated for the purposes of punishment. The judgment of the Court is that the defendant be confined in the custody of the Department of Correction for a period of six years to run concurrently with the sentences imposed in 2608 and 2609. This is also the presumptive sentence.

No, correction, this is also a sentence entered as a result of a plea bargain.

EXCEPTION NO. 3.

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All right. That's six years.

MR. EDMUNDSON: Yes, sir.

THE COURT: Fixed up so that nobody on earth can ever upset it on appeal. I don't think that's intended to be that way.

MR. EDMUNDSON: Yes, sir, thank you, Your Honor.

THE COURT: All right, he's in custody.

EXCEPTION NO. 4.

We note that the defendant acknowledges the occurrence of the plea negotiations and his plea of guilty in his verified petition for writ of certiorari:

Following plea negotiations, Mr. Edmundson and the District Attorney's office indicated that an agreement had been reached. Michael Anthony Williams pled guilty to 82-CRS-2609, receiving a three year sentence; and to 82-CRS-2610 and 82-CRS-2608, for which he received a six year sentence. All sentences were to run concurrently for a period of six years.

The brief presents two questions for our review: (1) Did the trial court err in failing to determine that the defendant's guilty pleas were freely and voluntarily entered and the product of informed choice in violation of his constitutional rights? (2) Did the trial court commit error when it failed to safeguard the defendant's rights under G.S. 15A-1022 which will entitle the defendant to replead? We answer no to both questions for the reasons that follow.

Upon arrival of the case in the appellate division the burden is upon the criminal defendant not only to show error but to show prejudicial error. As manifested by our Supreme Court in *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962), "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." Additionally, the court in *Pope* asserted that "[i]n our opinion rules of mathematical certainty and rigidity cannot be

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applied to the sentencing process. Justice may be served more by the substance than the form of the process. We prefer to consider each case in the light of its circumstances." *Id.* at 334, 126 S.E. 2d at 132.

The defendant alleges that the trial court violated his federal constitutional rights, as laid down in *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969), by failing to affirmatively find on the record that his plea was voluntarily and intelligently made. While we recognize that a violation of the *Boykin* principles is error, this realization does not complete our task. Moreover, we note the applicability of what our Supreme Court said in *State v. Heard and Jones*, 285 N.C. 167, 172, 203 S.E. 2d 826, 829 (1974):

We recognize that all Federal Constitutional errors are not prejudicial, and under the facts of a particular case, they may be determined to be harmless, so as not to require an automatic reversal upon conviction. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Nevertheless, before a court can find a Constitutional error to be harmless it must be able to declare a belief that such error was harmless beyond a reasonable doubt. *Schneble v. Florida*, 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056; *Harrington v. California*, 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726; *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824; *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229; *State v. Cox and State v. Ward and State v. Gary*, 281 N.C. 275, 188 S.E. 2d 356; *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858; *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399; *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398.

Since the right to appeal is wholly statutory, according to *State v. Blades*, 209 N.C. 56, 182 S.E. 714 (1935), Article 91 of Chapter 15A of the North Carolina General Statutes provides the means for correction of error by the appellate division. G.S. 15A-1443 speaks to the existence and showing of prejudice. Section (a) addresses the defendant's burden when the error does not arise under the United States Constitution and requires a showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been

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reached at the trial out of which the appeal arises." Section (b) addresses the State's burden of proof when the error arises under the United States Constitution and requires a demonstration of proof "beyond a reasonable doubt, that the error was harmless."

Here, it is obvious that the judge did not address the defendant personally nor inquire of him the things specified in G.S. 15A-1022. The positive directives of the statute were not performed by the judge. There is no finding that the plea is the result of the informed choice of the defendant. However, we find it more than interesting to note that nowhere in his brief, his statement of the facts, or in his petition for writ of certiorari, does the defendant ever make any allegation that the negotiated plea of guilty was unauthorized by him, or that his counsel did not inform him of all the plea arrangements prior to the entry of same in open court, or that the pleas of guilty as entered deviated in any way whatsoever from the sentences he had been led to believe he would receive. See *United States v. White*, 572 F. 2d 1007 (4th Cir. 1978). He accuses the court of not complying with the statute, and for this reason alone he says he should now have the benefit of repleading. He does not allege or cite any prejudice to him flowing from the results of the court's failure to follow the statute.

Also, there is no challenge of ineffective assistance of counsel. There is no factual challenge to the negotiated plea for an active sentence of six years. He does not accuse his counsel of pleading him guilty against his will. His privately-retained counsel was present at all times. Counsel did not object at trial to the failure to follow G.S. 15A-1022. Apparently, it was an oversight by all involved. Twice defense counsel was personally addressed by the court and asked if there was anything else for the judge's consideration. If counsel had not discussed the plea arrangement with the defendant and if counsel had not believed the plea was the informed voluntary choice of the defendant, he had the duty as an officer of the court, as well as the ethical duty to his client, to immediately inform the court of any misunderstanding. Counsel kept silent then, and in the subsequently filed papers has silently failed to suggest any lack of knowledge or full awareness in his client of all that was happening.

In effect, the defendant fails to allege any facts to show that the pleas of guilty were involuntary, only that the judge did not

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ask him personally if they were voluntary. Even though it is error under the statute and constitution, *Boykin v. Alabama, supra*, for the court to fail to personally inquire of the defendant about his plea and to determine that the plea was voluntary and the informed choice of the defendant, under the total facts and circumstances of this case the error is harmless beyond a reasonable doubt. See *United States v. Hastings*, --- U.S. ---, ---, 76 L.Ed. 2d 96, 105, 103 S.Ct. 1974, 1979-80 (1983). There is no showing of a reasonable possibility that a different result could have or would have been reached at the trial level had the error not been committed at the trial and sentencing stage. See *State v. Bush, supra*, at 167, fn. 6, 297 S.E. 2d at 573. Additionally, in examining the effect of error, the record shows no cause to excuse his failure to raise the asserted error at trial in the presence of the judge, and there is no showing of any actual prejudice resulting from the error. See *United States v. Frady*, 456 U.S. 152, 71 L.Ed. 2d 816, 102 S.Ct. 1584, *reh'g denied*, 456 U.S. 1001, 73 L.Ed. 2d 1296, 102 S.Ct. 2287 (1982). We recognize the potential for harm that is present if this method of taking a plea of guilty becomes vogue. Yet, even though this method is not recommended and should not be followed, no basis in law exists on these facts to award a new trial or to allow the defendant to replead.

In our research we note some similarity between our case and *Moore v. United States*, 592 F. 2d 753 (4th Cir. 1979). In *Moore* the defendant had pled guilty to one count of a violation of the narcotic laws. He petitioned to set aside his plea and to vacate the sentence. In holding that the federal district court had violated the rule relating to guilty plea proceedings when it failed to explain special parole to the petitioner and imposed a sentence which exceeded what the petitioner had been advised, the Court of Appeals remanded the case only for the imposition of a sentence to correspond with what the defendant had been promised. In spite of procedural error, the Court said, "[W]e do not believe, however, that the error requires us to set aside the plea." *Id.* at 756. The court went on to point out that upon a reduction in sentence to correspond with the petitioner's understanding any prejudice would be cured. Because in the case before us there is no showing of a different sentence to be imposed nor a showing of any prejudice to be cured (only naked error to be cured), no remand is warranted.

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We have also considered *Manley v. United States*, 588 F. 2d 79 (4th Cir. 1978). In contending that his pleas of *nolo contendere* to six counts of drug law violation were invalid, Manley alleged that "the trial court had 'misinformed Movant as to the range of allowable penalties,'" and asked to have his sentence vacated. *Id.* at 81. In recognizing that there had been incorrect information about sentencing given to the defendant by the trial judge, the United States Court of Appeals declared authoritatively that "[t]his does not establish a per se rule that every error in sentence advice will permit the accused later to upset his guilty plea." *Id.* at 81. In further clarification of its holding, the *Manley* court wrote:

And we would note that, at least under former Rule 11 as it applied on the date of Manley's plea, the trial court's misstatement of the possible sentence is not irremediable error if the defendant has been correctly advised by his counsel. See *Hammond*, 528 F. 2d at 17, 18; *Pilkington*, 315 F. 2d at 209. To hold otherwise would be to reward "'sandbagging' on the part of defense lawyers" who, while correctly advising their clients, might fail to advise the court of an easily redeemed error. *Id.* at 82.

In 1970 the former Chief Justice of the California Supreme Court, Roger J. Traynor, published a book through the Ohio State University Press, called "The Riddle of the Harmless Error." In 1971 Professor Willis L. M. Reese of Columbia reviewed Traynor's book in the Columbia Law Review. In his discussion of error Reese wrote of Traynor's analysis: "[C]ommon sense dictates that a reversal should not be the product of an error which did not affect the result reached by the judgment and which threatened no harm to the judicial system." Reese, Book Review, 71 Colum. L. Rev. 527, 528 (1971). Reese concluded that Traynor advocated "a two-barreled test" for error: "that an error should lead to reversal unless the appellate court believes it 'highly probable' both (a) that the error did not affect the result reached by the judgment and (b) that affirmance would not harm the judicial system as a whole, either by causing people to lose confidence in the system or by reason of the failure of the appellate court to use reversal as a means of imposing discipline upon the trial judge." *Id.* at 529. Reese then questions "whether any single test or formula can satisfactorily deal with all the various prob-

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lems relating to harmless error that may be expected to arise." *Id.* In the situation before us we are of the opinion that the errors alleged did not affect the result reached in the plea arrangement. The sentences which were pronounced pursuant to this plea arrangement on the whole threatened no harm to the North Carolina judicial system.

On the whole record we find that there was a factual basis for the negotiated plea. The judge was the same person who had just heard the evidence in the jury trial on the same type of offense involving the same series of transactions. *See State v. Williams, supra* (filed 6 December 1983). Two codefendants had testified against Mr. Williams. The defendant's own counsel had informed the court in the presence of the defendant that the evidence would be the same for the doctor's office and the two cabin cases. *See State v. Dickins*, 299 N.C. 76, 261 S.E. 2d 183 (1980). Obviously, on 11 August 1982 the defendant was fully aware that he had been found guilty the previous day of a crime that could possibly result in his being sentenced to prison. In the face of this fact, it was wise policy for him and for his counsel to enter into plea negotiations on all remaining charges. The State has kept the arrangement. The defendant must now do the same.

No prejudicial error has been shown.

Affirmed.

Judges ARNOLD and HILL concur.

TERRY FAULKNER v. NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION

No. 823SC1222

(Filed 20 December 1983)

1. Schools § 13.2— teacher dismissal— whole record test— consideration of Professional Review Committee panel's report

In reviewing the whole record to determine whether there was substantial evidence to support a board of education's findings of fact and conclusions in dismissing a career teacher, the appellate court must consider the panel report of the Professional Review Committee finding the allegations against respondent to be unsubstantiated. G.S. 150A-51.

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2. Schools § 13.2— teacher dismissal—excessive user of alcohol—insufficient evidence

The evidence was insufficient to support a school board's decision to dismiss a career teacher because the teacher is an "habitual and/or excessive user of alcohol." G.S. 115C-325(e)(1)(f).

3. Schools § 13.2— teacher dismissal—failure to fulfill duties—insufficient evidence

The evidence was insufficient to support a school board's decision to dismiss a career teacher for "failure to fulfill the duties and responsibilities imposed on teachers by the General Statutes of this State." G.S. 115C-325(e)(1)(i).

APPEAL by plaintiff from *Reid, Judge*. Judgment entered 13 August 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 19 October 1983.

Plaintiff was a "career teacher" as defined by G.S. 115C-325(c). He had been teaching in the New Bern, and later the New Bern-Craven County, school system since 1969. In 1981 he was teaching seventh grade language arts at the H. J. MacDonald School. On 17 September 1981, the New Bern-Craven County Board of Education (hereinafter Board), upon the recommendation of the Superintendent of the New Bern-Craven County Schools (hereinafter Superintendent), voted by unanimous resolution to suspend plaintiff from his teaching duties without pay pursuant to G.S. 115C-325(f). The Board's grounds for suspension were immorality, insubordination, neglect of duty and habitual or excessive use of alcohol, G.S. 115C-325(e)(1)(b), (c), (d) and (f).

Upon being advised of the Board's action and of the Superintendent's intention to recommend his dismissal, plaintiff requested a hearing before a panel of the Professional Review Committee, pursuant to G.S. 115C-325(h)(3). A hearing was conducted on 3 November 1981. The Professional Review Committee panel unanimously found that the charges presented were "not true and substantiated."

Notwithstanding the Professional Review Committee panel's report the Superintendent, pursuant to G.S. 115C-325(i)(5), submitted a written recommendation for dismissal to the Board. This recommendation was accompanied by the panel's report. After receiving notification of the Superintendent's recommendation, plaintiff requested a hearing before the Board pursuant to G.S. 115C-325 (i)(6). The Board conducted a hearing on 3 December

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1981. Following the hearing, the Board unanimously voted to dismiss plaintiff and directed that an order be drawn dismissing plaintiff as a teacher at H. J. MacDonald School. The grounds stated were that plaintiff had "made habitual and/or excessive use of alcohol" in violation of G.S. 115C-325(e)(1)(f); and that he had "failed to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of this State" in violation of G.S. 115C-325(e)(1)(i).

Plaintiff appealed the Board's order to the Craven County Superior Court pursuant to G.S. 150A-43 *et seq.* Plaintiff also filed a Petition for Judicial Review of the decision and a complaint seeking reinstatement, back pay, costs, and attorney fees. The matter was heard by Judge Reid who entered an order affirming the Board's action on 13 August 1982. Plaintiff appealed.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, by Yvonne Mims Evans and James C. Fuller, Jr., for plaintiff appellant.

Henderson and Baxter, by David S. Henderson, for defendant appellee.

PHILLIPS, Judge.

The appropriate standard of judicial review for reviewing administrative decisions of boards of education is set forth in G.S. 150A-51. *Overton v. Board of Education*, 304 N.C. 312, 283 S.E. 2d 495 (1981). G.S. 150A-51 in pertinent part provides:

The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:

. . . .

- (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted

This standard of review is commonly referred to as the "whole record" test. In explaining what is involved in "whole record" review Justice Copeland stated:

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This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences can be drawn. (Citations omitted.)

Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). "The 'whole record' test is not a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E. 2d 912, 922 (1979); *Overton v. Board of Education*, 304 N.C. 312, 322, 283 S.E. 2d 495, 501 (1981).

The Board made the following pertinent conclusions of law:

1. That the teacher, Terry M. Faulkner, has made habitual and/or excessive use of alcohol (G.S. 115C-325(e)(1)(f)) in that on an occasion or occasions during the 1980-1981 school year, Faulkner has consumed some form of alcoholic beverages at school, or, at least, has had the odor of alcohol on his breath at school during instructional hours, and has, during the school day, on occasions during the 1981-1982 school year, and after reprimand and warning against the same, consumed alcoholic beverages, or at least, has had the odor of alcohol on his breath.

2. The said Terry M. Faulkner, teacher, has failed to fulfill the duties and responsibilities imposed upon teachers by the General Statutes of this State (G.S. 115C-325(e)(1)(i)) in that during the 1980-1981 school year he has absented himself from his classroom and classroom duties for inordinate

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lengths of time; and has, after warning and reprimand against the same, during the 1981-1982 school year, been absent for inordinate lengths of time from his classroom and classroom duties.

These conclusions were based upon the following pertinent findings of fact:

4. That at some time during the 1980-1981 school year, while employed as a career teacher at the H. J. MacDonald Middle School and during regular instructional hours, the Principal of said school, Mr. Albert U. Hardison, did detect the odor of alcohol on the breath of said teacher, Terry M. Faulkner; and said Principal did remonstrate with and did informally reprimand said teacher for said conduct and did informally warn him against any further conduct of this kind, specifically, having the odor of alcohol on his breath at school, although no formal complaint was filed in his personnel file.

5. That following the reprimand by the Principal hereinabove set out in Paragraph 4, the Principal directed one Marie Satz, a counselor employed at the H. J. MacDonald Middle School and a friend of Faulkner, to talk with Faulkner regarding this problem; that she did talk with Faulkner at the request of the Principal.

6. That on several occasions during the early part of the 1981-1982 school year, the odor of alcohol was detected on the breath of Mr. Faulkner by another teacher, a Mrs. Margie Rice.

7. That on or about Thursday, September 3, 1981, a Mrs. Frances Motley, a parent, who had gone to Faulkner's classroom to obtain assignments for her child who was a student of Faulkner, detected the odor of alcohol on Faulkner's breath at approximately 2:30 o'clock P.M. on Thursday, September 3, 1981; and reported the same to the Superintendent.

8. That other complaints were received verbally and in writing by the said Principal and the Superintendent regarding the odor of alcohol on Faulkner's breath during the early part of the 1980-1981 school year.

. . . .

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11. That during the 1980-1981 school year, the said Principal summoned Faulkner to his office and reprimanded him with regard to his extended absences from his classroom which he had a duty to instruct and supervise; whereupon the said Faulkner admitted the fact of being absent for inordinate periods of time from his classroom and promised to correct this inadequacy.

12. That the said Principal assumed that this problem regarding absences for inordinate lengths of time from the classroom had been corrected; however, during the early part of the 1981-1982 school year, because of complaints received by the Principal regarding extended absences from his classroom Faulkner was again reprimanded and warned by the Principal for the same, to which the said Faulkner admitted his absence from his classroom for inordinate lengths of time without just cause or excuse.

Plaintiff contends that these findings of fact and conclusions of law are erroneous in that they are not supported by substantial evidence. The evidence relied upon by the Board to support findings of fact numbers four through eight and conclusion number one tends to show: That near the beginning of the 1980-1981 school year Mr. Albert U. Hardison, H. J. MacDonald School principal, detected what he "believed to be the smell of alcohol" on plaintiff's breath; that when confronted with the charge plaintiff denied that he had been drinking; that the principal asked Mrs. Satz, a counselor at the school, if she would "talk with" the plaintiff about this; that during the first week of the 1981-1982 school year the principal received a complaint from Mr. Robert W. Brinson, Sr. that his son had smelled alcohol on the plaintiff's breath; and that he received a complaint from Mrs. Frances M. Motley that she had smelled alcohol on plaintiff's breath when she came to school to pick up her child's assignments. Marie Satz testified that she talked with plaintiff about drinking once during the 1980-1981 school year after the principal requested that she do so. She further testified that plaintiff denied having any odor of alcohol about his person at school. Robert W. Brinson, Sr. testified that his son told him on "several occasions" that the son had smelled alcohol on plaintiff's breath. These occasions all occurred during the first week of the 1981-1982 school year. Frances M. Motley testified that one day during the first week of the

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1981-1982 school year when she went to school to pick up her son's assignments, she smelled what she thought to be alcohol on plaintiff's breath. She further testified that when she went to get the assignments plaintiff "was very, very nice" and that his speech was not slurred and that he walked straight. She further testified that her son told her he smelled something which "smelled like alcohol to him" on plaintiff. Margie Rice, a teacher at the school who worked in a different pod from plaintiff, testified that she smelled alcohol on plaintiff's breath during one of the teacher workdays at the beginning of the 1981-1982 school year and "maybe once or twice" after the students started to class, but that she didn't report it to anyone "because to me it wasn't that bad." The Superintendent testified that he had received complaints about the plaintiff having alcohol on his breath at school from parents. The only parents he identified were Mr. Brinson and Mrs. Motley.

Plaintiff offered evidence from Lois Evans, a teacher with over twenty years experience, who testified that she had bus duty with the plaintiff and she never saw him intoxicated and that she had never smelled alcohol on his breath. She further testified that she saw plaintiff a "great deal" because there were "many meetings at the beginning of school." She testified she usually sat at the same table with plaintiff during the meetings and had never smelled alcohol on his breath. Ernestine Rankin, a teacher with over thirty years experience, also testified that she had never smelled alcohol on plaintiff, nor had she heard any complaints about this from other members of the faculty. Annie Nixon, who taught in the same pod with plaintiff during the 1978-1979 and 1980-1981 school years, testified that she saw plaintiff "just about every morning" before his suspension and that she never smelled alcohol on his breath. Helen Adams, who taught in the same pod with plaintiff during the 1981-1982 school year, testified that she had never smelled alcohol on his breath. She further testified that she had eaten lunch with him on several occasions and had never smelled alcohol on his breath on those occasions either. Evelyn Peterson testified that she taught on the same floor with plaintiff and saw him twice per day during the 1980-1981 school year and every day before his suspension in the 1981-1982 school year, and that during these occasions she stood close enough to him to talk with him and that she did not

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smell alcohol on his breath on any of these occasions. On cross-examination the principal testified that he had daily contact with the plaintiff during the 1981-1982 school year and that at no time during this period did he smell alcohol on plaintiff. He further testified that only on the one occasion, related by him on direct, did he smell alcohol on plaintiff's breath during the 1980-1981 school year. Plaintiff testified that he never drank at school but that he did have a drink or sometimes two before dinner and that he had a nightcap before he went to bed.

[1] In reviewing the whole record to determine whether there is substantial evidence to support the Board's findings of fact and conclusions we must also consider the Professional Review Committee panel's report that they found these allegations to be "not true and substantiated." *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

G.S. 115C-325(e)(1)(f) lists the "habitual or excessive use of alcohol" as a permissible ground for the dismissal of a career teacher. Webster's Third New International Dictionary 792 (1968) defines excessive as "characterized by or present in excess; . . . very large, great or numerous." Habitual is defined as "doing, practicing, or acting in some manner by force of habit: customarily doing a certain thing." *Id.* at 1017.

[2] An examination of the "whole record" reveals that standing alone the Board's evidence would show that over a two-year time span four different people smelled, "thought they smelled," or "believed" that they smelled alcohol on plaintiff's person. This evidence must then be considered in conjunction with the Professional Review Committee panel's unanimous finding that the charges presented were "not true and substantiated." The substantial evidence standard is not altered because the Board and panel disagree. "However, the evidence supporting a school board's decision may appear less substantial when an impartial panel, which has observed the witnesses and dealt with the case, has drawn different conclusions than when the panel has reached the same conclusion as the school board." *Thompson v. Board of Education*, at 414, 233 S.E. 2d at 543. Furthermore, the Board's evidence must be weighed together with evidence from several of plaintiff's co-workers, who had substantial contact with plaintiff, that they had never smelled alcohol about the plaintiff's person.

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After considering the whole record, we are obliged to conclude that the Board's conclusion that plaintiff is an "habitual and/or excessive user of alcohol" is not adequately supported by evidence and must be set aside. If the charge was drinking during school duty hours the decision would be otherwise; but, of course, the Legislature has not seen fit to make that a ground for discharging career teachers.

[3] G.S. 115C-325(e)(1)(i) allows for dismissal of a career teacher for "[f]ailure to fulfill the duties and responsibilities imposed on teachers by the General Statutes of this State." G.S. 115C-307 enumerates the duties of teachers. These duties are: (a) To Maintain Order and Discipline, (b) To Provide for the General Well-Being of Students, (c) To Provide Some Medical Care to Students, (d) To Teach the Students, (e) To Enter into the Superintendent's Plans for Professional Growth, (f) To Discourage Nonattendance, (g) To Make Required Reports, and (h) To Take Care of School Buildings.

The evidence offered in support of the Board's findings of fact numbers 11 and 12 and its conclusion that plaintiff failed to perform his duties and responsibilities as imposed by the General Statutes tends to show that during the 1980-1981 school year the principal received complaints "from a couple of parents" that plaintiff was absent from his class for excessive time periods. The principal testified that he talked with the plaintiff about these complaints and that plaintiff acknowledged they were valid. After the conference the problems were corrected. The principal further testified that he received complaints about plaintiff's absence from the classroom again at the beginning of the 1981-1982 school year and that after he talked with plaintiff about his absences from the classroom "then he did correct it to my satisfaction." Robert Brinson, Sr. testified that his son told him that plaintiff would come to class, give an assignment, and leave for long periods of time. This evidence also must be considered in conjunction with the Professional Review Committee panel's findings that the charges were "not true and substantiated," and in the light of the evidence from Mrs. Satz, the counselor called as a witness by the Superintendent, that it was common practice for teachers to take five or ten minute breaks from the classroom, that this was done throughout the school and continued up until the time of the hearing. In our view the record fails to show in

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any substantial way that plaintiff was derelict in any of the duties and responsibilities imposed on him by the General Assembly. We therefore hold that the Board's order dismissing plaintiff for the reasons stated in conclusion number two must also be set aside.

In light of the above holdings, plaintiff's argument that certain evidence was improperly admitted at the hearing need not be discussed. Suffice it to say the evidence presented, regardless of its caliber, was not sufficient to support the charges made.

The 13 August 1982 order of the trial court is reversed and the cause is remanded to the Superior Court of Craven County for entry of an order reinstating the plaintiff with back pay, reduced by his earnings during the period suspended, as determined by the court.

Reversed and remanded.

Judges WEBB and EAGLES concur.

MILLIKEN & COMPANY, RED SPRINGS PLANT, RED SPRINGS, NORTH CAROLINA 28377 v. DONNA GRIFFIN, POST OFFICE BOX 405, RED SPRINGS, NORTH CAROLINA 28377, S.S. No. 243-98-7494, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, POST OFFICE BOX 25903, RALEIGH, NORTH CAROLINA 27611, DOCKET No. 82(C)05152

No. 8210SC1318

(Filed 20 December 1983)

1. Master and Servant § 111.1— unemployment compensation—evidence supporting findings by Commission

The evidence in an unemployment compensation proceeding supported findings by the Employment Security Commission that claimant inquired of her employer as to more suitable work or a reduction of hours; that the employer could not place her in other work because of the position she held and could not shorten her work hours; and that claimant's doctor advised her to change jobs or to switch to a shift not longer than eight hours because of muscle spasms. G.S. 96-4(m); G.S. 96-15(1).

2. Master and Servant § 108— unemployment compensation—leaving job for health reasons

A claimant who leaves a job for health reasons has left involuntarily with good cause attributable to the employer and is entitled to unemployment benefits if he meets the three requirements set forth in G.S. 93-13(a).

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3. Master and Servant § 108.2— unemployment compensation—leaving employment for health reasons—availability for work

A claimant who left her job which required an 11-hour shift after her doctor advised her not to work longer than an eight-hour shift because of muscle spasms was "available for work" within the meaning of G.S. 96-13(a)(3).

APPEAL by Milliken & Company from *Hobgood, Judge*. Judgment entered 1 October 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 15 November 1983.

Milliken & Company appeals from a judgment of the superior court affirming a decision by the Employment Security Commission that claimant left her job due to health reasons and therefore qualifies for unemployment benefits.

V. Henry Gransee, Jr., Deputy Chief Counsel, for appellee Employment Security Commission of North Carolina.

Thompson, Mann and Hutson, by George J. Oliver and Allan L. Shackelford, for appellant Milliken & Company.

No counsel for appellee Donna Griffin.

ARNOLD, Judge.

On 26 October 1981 claimant filed a claim for unemployment benefits with her employer, Milliken & Company. She alleged that she quit her job as a shift manager on 14 October 1981 because of physical stress. An adjudicator determined that claimant was not disqualified for benefits under G.S. 96-14(1). This statute provides that an individual shall be disqualified if at the time his claim is filed he is "unemployed because he left work voluntarily without good cause attributable to the employer." The adjudicator found that claimant quit work involuntarily due to health reasons. Milliken appealed.

The matter was then heard before an appeals referee on 8 December 1981. After hearing the testimony of claimant, and the personnel manager and claimant's department manager at Milliken, the referee concluded that claimant was not disqualified for unemployment benefits, because her separation from employment was involuntary due to health reasons. He based his decision upon the following findings of fact:

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1. Claimant last worked for Milliken & Company on October 14, 1981. From October 18, 1981 until October 31, 1981, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a).

2. When claimant left the job, the conditions of employment for claimant were as follows: The claimant was a salaried employee as a shift manager on rotating shifts, each shift of eleven hours duration. The claimant on advice of her doctor, inquired of the employer, as to more suitable work or reduction in hours. The employer could not place her in other work because of her position and could not shorten her hours of work.

3. Claimant left the job because her doctor advised that due to her muscular spasms she would have to change jobs or be assigned in her work a shift of not longer than eight hours.

Both the Full Commission and the superior court affirmed the appeal referee's decision. The court found that the findings of fact were based upon competent evidence in the record; and that the law was properly applied to these facts.

[1] Milliken first argues that the superior court erred in finding that the Commission's findings of fact were based upon competent evidence contained in the record. It specifically argues that the facts do not support the findings that claimant inquired of her employer as to more suitable work or a reduction in hours; that the employer could not place her in other work because of claimant's position, and could not shorten her work hours, and that her doctor advised her to change jobs or switch to a shift not longer than eight hours because of muscular spasms. We are not persuaded by these arguments.

G.S. 96-4(m) provides that when exceptions are taken to the facts found by the Commission and appeal is made to the superior court, the Commission's determination "shall be conclusive and binding as to all questions of fact supported by any competent evidence." G.S. 96-15(i) provides: "In any judicial proceeding under this section the findings of the Commission as to the facts, if there is evidence to support them, and in the absence of fraud,

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shall be conclusive, and the jurisdiction of said court shall be confined to questions of law."

Applying this standard of review to the record here, we find that the facts are supported by competent evidence and are therefore conclusive and binding in this Court. The record shows that during the hearing before the appeals referee, the claimant testified that there were no shorter shifts for supervisors. Milliken's personnel manager testified that prior to the date claimant quit, he and claimant had discussed the possibility of a change in claimant's duties. He admitted that on the date claimant quit there was no other alternative for her. As to claimant's health, the record shows that claimant read a statement from her doctor which indicated that she was suffering from muscle strain; that her eleven hour shift was too much for her muscle structure, and that she would be no better until she reduced her work hours or changed her job. Milliken's argument that claimant had to present medical evidence to support her testimony is groundless. There is no statutory requirement for such evidence, and Milliken never requested to see any.

[2] Milliken next argues that the intent of the Employment Security Act is not to award people who leave their employment solely for health reasons; and that the Commission circumvented this intent by allowing claimant to recover benefits. Milliken bases its argument upon the following language in *In re Watson*, 273 N.C. 629, 633, 161 S.E. 2d 1, 5-6 (1968):

It is apparent that the Employment Security Act was not designed to provide the payment of benefits to a person who is physically unable to work or who, for any other personal reason, would at no time be in a position to accept any employment if it were tendered to him, however capable and industrious such person may be The act does not provide health insurance to the industrious worker stricken by accident or disease. . . . On the other hand, the statute must be construed so as to provide its benefits to one who becomes involuntarily unemployed, who is physically able to work, who is available for work at suitable employment and who, though actively seeking such employment, cannot find it through no fault of his own.

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Milliken emphasizes that this language overrules an earlier interpretation of the Act in an opinion by the Attorney General, 27 Biennial Report of the Attorney General of the State of North Carolina 433 (1942-1944). The Attorney General interpreted the phrase, "left work voluntarily without good cause attributable to the Employer," to include a person who has left his employment on account of illness, or other causes beyond his control, when such person upon removal of such causes is available for work but remains unemployed because of inability to find work with his employer or in other suitable employment.

The North Carolina Courts have not directly addressed the issue of whether a person who loses his employment for health reasons has left involuntarily with good cause attributable to the employer. It appears, however, that our courts have implicitly adopted the interpretation of the Act given in the Attorney General's Opinion and that this interpretation is consistent with the policy behind the Act.

In a recent decision this Court was faced with the question of whether a claimant who became ill with diabetes and was no longer able to work for his employer as a long-distance truck driver, or as a local driver because of the long work hours, could recover benefits. *In re George*, 42 N.C. App. 490, 256 S.E. 2d 826 (1979). On appeal from the decision awarding benefits to claimant, the employer did not argue that claimant had left work voluntarily without good cause attributable to employer. The employer, instead, argued that claimant was disqualified because he did not meet the following qualifications set out in G.S. 96-13(a):

- (1) He has registered for work at and thereafter has continued to report to an employment office in accordance with such regulations as the Commission may prescribe;
- (2) He has made a claim for benefits in accordance with the provisions of G.S. 96-15(a);
- (3) He is able to work, and is available for work

This Court reversed and remanded the decision for failure of the Commission to make findings required by G.S. 96-13(a)(1) and (2). We concluded, however, that there was sufficient evidence that claimant was available for work. The Commission found that the claimant was physically able to perform work not in excess of ten

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hours per day which did not require heavy lifting or being away from home overnight. Implicit in this decision is that a claimant who leaves a job for health reasons has left involuntarily with good cause attributable to the employer and is entitled to unemployment benefits as long as he meets the three qualifications in G.S. § 96-13(a).

[3] The Commission in the case on appeal expressly found that claimant had complied with the qualifications in G.S. 96-13(a)(1) and (2). As to subsection (3), the Commission found that because of muscle spasms claimant would have to be assigned to a shift of no more than eight hours. A reduction from eleven hours to eight hours is not such a restriction on the time of work so as to exclude claimant from the work force. She clearly met the qualifications entitling her to unemployment benefits.

This Court also finds no merit to Milliken's argument that the dicta in *In re Watson, supra*, and the interpretation of the Act given in the Attorney General's Opinion are inconsistent. As previously noted, the *Watson* court stated "that the Employment Security Act was not designed to provide the payment of benefits to a person who is physically unable to work or who, for any other personal reason, *would at no time be in a position to accept any employment if it were tendered to him*, however capable and industrious such person may be. (Emphasis supplied.)" *Id.* at 633, 161 S.E. 2d at 5-6. A person who must quit a job for health reasons but who is available for other employment is clearly not a person envisioned by this language. Both reason and justice demand that such a claimant receive unemployment benefits.

The *Watson* court further emphasized that those sections of the Act listing disqualifications for its benefits must be strictly construed in favor of claimants. In awarding benefits to the claimant now before us, the Commission followed this rule.

Milliken would have us follow those jurisdictions which have denied benefits to individuals who became unemployed because of sickness, accident or old age. *See* cases listed in 81 C.J.S. Social Security § 228 (1956). Milliken cites cases from West Virginia and South Carolina as examples of such jurisdictions. *State v. Hix*, 132 W.Va. 516, 54 S.E. 2d 198 (1949) and *Judson Mills v. South Carolina Unemployment Compensation Commission*, 204 S.C. 37, 28 S.E. 2d 535 (1944). *Hix*, however, was overruled in *Gibson v.*

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Rutledge, --- W.Va. ---, 298 S.E. 2d 137 (1982). We find that the language in the *Mills* decision is in conflict with the policy behind North Carolina's Employment Security Act and application of the Act. The *Mills* court concluded that "involuntary unemployment" under the Act meant unemployment resulting from a failure of industry to provide stable employment; and that unemployment due to changes in personal conditions to the employee, which made it impossible for him to continue his job, was not the type covered by the Act. Our Legislature did not intend such a narrow application of the Act when it declared the following public policy to be accomplished by the Act: "[T]he public good and the general welfare of the citizens of this State require the enactment of this measure . . . for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own." G.S. § 96-2.

Affirmed.

Judges HILL and BRASWELL concur.

STATE OF NORTH CAROLINA v. CARL WILLIAMS

No. 8316SC144

(Filed 20 December 1983)

Constitutional Law § 49— right to counsel—no effective waiver—proceeding without counsel improper

In a prosecution for armed robbery, defendant's purported waiver of counsel and election to proceed *pro se* in superior court were deficient in several respects: (1) no determination was made as to whether defendant was represented by counsel, (2) even though defendant clearly was not represented, he was not informed of his right to counsel, (3) defendant was never asked and the court never determined whether he was able to afford the private counsel that he had indicated at district court he "would like to hire." Lacking in these particulars and in light of defendant's answers to the trial judge at his arraignment in superior court that he wanted a lawyer and did not wish to waive the right, defendant's waiver was not constitutionally valid. G.S. 15A-942; G.S. 15A-603.

APPEAL by defendant from *Bailey, Judge*. Judgment entered 23 February 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 19 October 1983.

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On 14 December 1981, defendant was arrested on a charge of armed robbery. Defendant's first appearance in Robeson County District Court was held on 18 December 1981. Although no transcript was made of the first appearance proceedings, there is a record that contains the following material determinations:

The defendant is not represented by an attorney at this time, and pursuant to G.S. 15A-60 the defendant has been informed of the right to remain silent and that anything defendant says may be used against him; and pursuant xx to G.S. 15A-603 the defendant has been informed that the defendant has important legal rights which may be waived unless asserted in a timely and proper manner and that counsel may be of assistance to the defendant in advising and acting in defendant's behalf.

The defendant has indicated that he understands the right to have counsel appointed if indigent and the State will pay the fee but that defendant desires to waive representation by counsel and has signed a written waiver in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes and the undersigned finds that the defendant intelligently and understandingly waived the appointment of counsel.

As noted in the above determinations, defendant signed the following written waiver:

WAIVER OF RIGHT TO HAVE ASSIGNED COUNSEL

The undersigned represents to the Court that he has been informed of the charges against him, the nature thereof, and the statutory punishment therefor, or the nature of the proceeding, of the right to assignment of counsel, and the consequences of a waiver, all of which he fully understands. The undersigned now states to the Court that he does not desire the assignment of counsel, expressly waives the same and desires to appear in all respects in his own behalf, which he understands he has the right to do.

The following certificate was signed by the judge:

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CERTIFICATE OF JUDGE

I hereby certify that the above named person has been fully informed in open Court of the nature of the proceeding or of the charges against him and of his right to have counsel assigned by the Court to represent him in this case; that he has elected in open Court to be tried in this case without the assignment of counsel and that he has executed the above waiver in my presence after its meaning and effect have been fully explained to him.

On 6 January 1982, a probable cause hearing was held at which defendant was represented by counsel. Counsel's representation was limited to the probable cause hearing.

Defendant's next appearance was in Superior Court for the purpose of arraignment. Defendant was not represented by counsel. The transcript of this proceeding reads, in pertinent part, as follows:

MR. TOWNSEND [District Attorney]: . . . Do you have a lawyer?

MR. WILLIAMS [Defendant]: No, sir. I had a lawyer in Fayetteville. My mother, she had notified me she contacted Mister Willie Swann in Fayetteville. She was supposed to get him seven hundred dollars by today but she didn't get it to him.

THE COURT: That's a very serious charge placed against you, in which you could be sentenced to life, or a minimum of seven years, day for day, with respect to the presumptive sentence if it happened after the first of July, last year. Do you want the Court to appoint a lawyer for your [sic] or do you want to hire your own lawyer?

MR. WILLIAMS: I waived my rights to court appointed lawyer. My mother she a

THE COURT: When did you do that? In District Court?

MR. WILLIAMS: No, sir.

MR. TOWNSEND: Is that what your [sic] want to do? Waive this right?

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MR. WILLIAMS: No, sir.

MR. THOWNSEND [sic]: I thought that's what he wanted to do, your Honor.

MR. WILLIAMS: I was supposed to have another lawyer; I was supposed to have a lawyer here. That's what my mother said, but she had a slight heart attack and didn't get to see him. I went to Fayetteville to see and try to get Mister Willie Swann.

THE COURT: You went to talk to Mister Swann, is that right?

MR. WILLIAMS: Yes, sir, I got to talk to him.

THE COURT: Who has the file in this case? (Gets file from Court Clerk, looks through file.) He says something about a waiver in there, in Superior Court. For the purpose of this hearing, it's my understanding that in the Superior Court you have not waived a lawyer?

MR. WILLIAMS: No, sir.

THE COURT: Now, do you want a lawyer?

MR. WILLIAMS: Yes, sir.

THE COURT: Do you want to hire your own lawyer.

MR. WILLIAMS: I would like to hire my own lawyer.

THE COURT: You want . . . then you want the Court to allow you to hire your own lawyer, to pick the lawyer you get, and you want to give up your right to have the Court to appoint one for you?

MR. WILLIAMS: Yes, sir.

THE COURT: Come up and sign a waiver of your right to Court appointed counsel

The form waiver signed is identical to the one signed in District Court and set forth above. Similarly, the judge signed a "Certificate of Judge" identical to the one set forth above. The arraignment was continued one week with directions from the court for defendant to hire an attorney.

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On 23 February 1982, defendant was tried but was not represented by counsel. No inquiry was made as to defendant's *pro se* appearance. Defendant was found guilty and received a sentence of twelve years imprisonment. From the entry of this judgment, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.

Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

EAGLES, Judge.

The Sixth Amendment to the United States Constitution guarantees that a person charged with a serious crime shall have the right to legal counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Where a person is entitled to counsel but cannot afford to hire an attorney, one must be provided by the court. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The right to representation by counsel for certain crimes is made applicable to the states by the Fourteenth Amendment. *Argersinger v. Hamlin*, *Gideon v. Wainwright*, both *supra*. See U.S. Const., Amends. 6, 14. Any person arrested by North Carolina authorities must be brought before a magistrate for an initial appearance at which he or she is advised *inter alia* of the right to communicate with counsel. G.S. 15A-511(b). A person charged with a crime that is in the original jurisdiction of the Superior Court is then brought into District Court for a first appearance. G.S. 15A-601. The initial appearance required by G.S. 15A-511(b) and the first appearance required by G.S. 15A-601 may be consolidated and held before the District Court judge. G.S. 15A-601(b). At the first appearance, defendant's Sixth Amendment right to counsel is provided for as follows:

(a) The judge must determine whether the defendant has retained counsel or, if indigent, has been assigned counsel.

(b) If the defendant is not represented by counsel, the judge must inform the defendant that he has important legal rights which may be waived unless asserted in a timely and proper manner and that counsel may be of assistance to the defendant in advising him and acting in his behalf. The judge must inform the defendant of his right to be represented by

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counsel and that he will be furnished counsel if he is indigent. The judge shall also advise the defendant that if he is convicted and placed on probation, payment of the expense of counsel assigned to represent him may be made a condition of probation, and that if he is acquitted, he will have no obligation to pay the expense of assigned counsel.

(c) If the defendant asserts that he is indigent and desires counsel, the judge must proceed in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes.

(d) If the defendant is found not to be indigent and indicates that he desires to be represented by counsel, the judge must inform him that he should obtain counsel promptly.

(e) If the defendant desires to waive representation by counsel, the waiver must be in writing in accordance with the provisions of Article 36 of Chapter 7A of the General Statutes except as otherwise provided in this Article.

G.S. 15A-603 (Supp. 1981). See G.S. 7A-450 *et seq.* (Ch. 7A, Art. 36) (procedure for determining indigency and entitlement to court appointed counsel).

A person who is entitled to counsel has the corollary right to refuse counsel and conduct his own defense. *Faretta v. California*, 422 U.S. 806 (1975); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *State v. Simmons*, 56 N.C. App. 34, 286 S.E. 2d 898, *disc. rev. denied* and *appeal dismissed*, 305 N.C. 591, 292 S.E. 2d 12 (1982). Addressing the right of an accused person to waive counsel, our Supreme Court has held:

The right to counsel guaranteed to all criminal defendants by the Constitution also implicitly gives a defendant a right to refuse counsel and conduct his or her own defense However, the waiver of counsel, like the waiver of all constitutional rights, must be knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will

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State v. Thacker, 301 N.C. 348, 353-54, 271 S.E. 2d 252, 256 (1980).

The question presented for our consideration is whether this defendant's waiver of his right to counsel and election to represent himself was knowing, voluntary and otherwise consistent with the constitutional requirements for a valid waiver. For the following reasons, we hold that it was not.

Defendant's purported waiver of counsel and election to proceed *pro se* in Superior Court were both made at his arraignment before Judge Morgan. Although defendant had previously signed a written waiver form in District Court, his appearance at the arraignment without counsel invoked the mandatory provisions of G.S. 15A-942.

If the defendant appears at the arraignment without counsel, the court must inform the defendant of his right to counsel, must accord the defendant opportunity to exercise that right, and must take any action necessary to effectuate the right.

Where the court is required in a pre-trial proceeding in Superior Court to "inform" a defendant of his right to counsel, it must be done in substantially the same manner as at the first appearance in District Court. See G.S. 15A-603 (set out above). Although we find no case squarely on point, our interpretation is supported in the statutes. G.S. 7A-457 provides that an indigent person may waive counsel provided "the court finds of record that at the time of waiver the indigent person acted with full awareness of his rights and of the consequences of the waiver." This statute presupposes that a defendant has been informed of his rights and given an opportunity to act on the information as provided in G.S. 15A-603. This involves a determination of defendant's indigency and entitlement to court appointed counsel. G.S. 15A-603(c); G.S. 7A-450 *et seq.* (Ch. 7A, Art. 36). However, whether or not a defendant is indigent, any waiver must be in accordance with G.S. 7A-457, notwithstanding the limiting language thereof. See G.S. 15A-603(e) (requiring all waivers to be in accordance with G.S. Chap. 7A, Art. 36). Thus, a defendant who appears without counsel at his arraignment must be properly informed of his rights in the manner required by G.S. 15A-603. Where the defendant nevertheless wishes to waive counsel, the court must find that G.S. 15A-603 has been complied with before a valid waiver can be made.

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The waiver in the present case is deficient in several respects. First, no determination was made as to whether defendant was represented by counsel. Second, even though defendant clearly was not represented, he was not informed of his right to counsel. Third, defendant was never asked and the court never determined whether he was able to afford the private counsel that he indicated he "would like to hire." Lacking in these particulars and in light of defendant's answers to Judge Morgan that he wanted a lawyer and did not wish to waive the right, defendant's waiver is not constitutionally valid.

The State contends on the basis of *State v. Atkinson*, 51 N.C. App. 683, 277 S.E. 2d 464 (1981), that the totality of the circumstances in this case is such that the trial court did effectuate defendant's right to counsel. Seeking to draw a comparison with *Atkinson*, the State notes particularly that the defendant there had signed two unconditional waivers of counsel. In that case, "the record . . . clearly demonstrates that defendant waived his right to counsel in a knowing and voluntary manner." *Id.* at 685, 277 S.E. 2d at 466. Here, however, the record clearly demonstrates that defendant's waiver was not knowing and voluntary and did not meet the constitutional and statutory requisites for a valid waiver.

The colloquy between Judge Morgan and the defendant at the arraignment is somewhat ambiguous but the importance of the right to counsel is such that we cannot infer a waiver here. The judge, having the duty to inform defendant of his rights, had the duty to do so in a manner that would render any subsequent waiver knowing and voluntary and thereby constitutionally valid. On the record here, defendant was not properly apprised of his rights. His waiver is therefore invalid and he is accordingly awarded a

New trial.

Judges WEBB and PHILLIPS concur.

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PAULA L. PHILLIPS AND AGNES R. LOTT v. JOHN CHOPLIN

No. 8320DC72

(Filed 20 December 1983)

1. Divorce and Alimony § 25.6— child custody—award to grandmother rather than to father

The trial court did not abuse its discretion in awarding custody of two minor children to their maternal grandmother rather than their father even though the court found the father to be a fit and proper person to have custody of the children. G.S. 50-13.2(a).

2. Divorce and Alimony § 24.7— child support—modification for changed circumstances

The trial court did not err in increasing defendant father's child support payments from \$100.00 to \$200.00 per month on the basis of changed circumstances, although the court found that the needs of the children were not as great as when the original support order was entered, where the prior support payments were not adequate to meet the needs of the children as found by the court, and where the evidence showed that defendant's income has increased because he has taken a part-time job and that debts from his prior marriage have been paid off since the time of the original support order.

APPEAL by defendant from *Honeycutt, Judge*. Orders entered 7 September 1982 in District Court, RICHMOND County. Heard in the Court of Appeals 8 December 1983.

This is a civil action wherein the defendant filed a motion in the cause seeking a change of custody of the children born of his marriage with Paula L. Phillips. Agnes R. Lott, the children's maternal grandmother, was added as a party plaintiff pursuant to Rule 19, North Carolina Rules of Civil Procedure. Plaintiffs then filed a motion in the cause praying that the custody of the children be placed either with Mrs. Lott or with Mrs. Lott and Mrs. Phillips jointly.

From the entry of an order granting custody of the children to Mrs. Lott and increasing defendant's child support payments from one hundred to two hundred dollars per month, defendant appealed.

Webb, Lee, Davis, Gibson & Webb, by Norman T. Gibson, for the plaintiffs, appellees.

David B. Hough, for the defendant, appellant.

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HEDRICK, Judge.

On 12 December 1977, plaintiff Phillips (then Choplin) filed suit against defendant seeking *inter alia* custody of the minor children born of their marriage and support for those children. A consent order was entered on 9 January 1978 whereby Phillips was awarded custody of the children, and defendant was granted visitation rights and ordered to pay \$80 per month support. In January 1979 Choplin's support obligations were increased to \$100 per month. In the summer of 1979, Phillips gave her parents, Mrs. Agnes Lott, and the late Mr. Lott, physical custody of the children. Physical custody has remained with Mrs. Lott since that time. Defendant has met his support obligations, and fully exercised his visitation rights during this time period. On 25 February 1982, defendant filed this motion in the cause seeking custody of the children. Plaintiffs filed cross motions. A hearing was conducted on these motions and the court entered an order which contained the following pertinent findings of fact:

...

3. That in the summer of 1979, Paula L. Choplin (now Phillips) with the full knowledge of the defendant John Choplin placed the two children with her mother, Agnes R. Lott, maternal grandmother of the boys. That the two boys have lived with Agnes R. Lott since then. That Ian Choplin is 8 years old, and John Paul Choplin is 9 years old.

4. That since the summer of 1979, Agnes R. Lott has provided the necessary care, supervision, and training for said children and she has helped financially support the said two children.

5. That the plaintiff Paula L. Choplin (now Phillips) has not contributed regularly to the support of said children, but has bought clothes for the children when she has been financially able. That the defendant has regularly paid \$100 per month child support as ordered.

6. That since the summer of 1979, Agnes R. Lott has seen that the boys attend school regularly, provided after school recreation for them at the Playhouse Day Care Center for approximately an hour each day, and has sent them to Day Camp each summer where they have enjoyed recreation-

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al programs of baseball, swimming, football, bowling, skating and arts and crafts, including drawing.

7. That the defendant and the plaintiff Paula L. Choplin (now Phillips) acquiesced in and did nothing to change how their children were being cared for, nor offered to assist additionally in the care of said children, nor offered to take the boys to live with them until defendant filed his present motion for custody.

8. That Agnes R. Lott is in excellent health, very active physically in that she she [sic] does her own housework, does all the family cooking, cleaning and washing of clothes for herself and the boys, and mows her own yard with a push mower. That Agnes R. Lott is retired from her former employment in the Western Auto Store in Rockingham, and has all of her time available to care for the needs of the boys. That Agnes R. Lott lives in a nice, comfortable two bedroom home in Hamlet, North Carolina. That an additional room can be readily converted to another bedroom if the boys desire separate rooms. That there is one child available to play with the boys in the neighborhood; however, the boys have about five good friends in the after-school day care and Summer Day Camp, which is located across from Fairview Heights School in Hamlet, North Carolina, which the boys attend. That the boys attend said after school center and Summer Day Camp along with 40 to 50 other children of their age group.

9. That John Choplin has remarried, is employed by the State of North Carolina, and travels 14 counties in North Carolina in his work with the North Carolina Department of Natural Resources inspecting wells. That his present wife owns a nice home in Winston-Salem in a neighborhood in which there are about ten children, and that the defendant's present wife has two boys that she does not have custody of as a result of her consent agreement. That John Choplin's present wife is employed.

10. That the boys, Ian C. Choplin and John Paul Choplin, II, are happy and well cared for in their home with the grandmother, Agnes R. Lott, are doing well in school, and

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distinctly prefer to continue to live with their grandmother in Hamlet, North Carolina.

11. That the plaintiff Agnes R. Lott spends on the average about \$300 a month for food, clothing, school supplies, Summer Day Camp, and after school care, and other necessities for the boys.

12. That the defendant makes \$1,524 per month gross wages with the State of North Carolina, and earns an additional net figure of \$25 to \$60 per week working part-time at the Tender Box as a salesclerk at Haines Mall in Winston-Salem. That the defendant has a net monthly income from the State of North Carolina after deductions of \$851.00; however, he pays \$100 a month into a savings account at the credit union which said \$100 is deducted from his check. That he has no unusual monthly expenses except the usual utilities and expenses.

13. Until recently, when the defendant filed his motion for a change of custody, he had never called Agnes R. Lott (since the summer of 1979) to inquire about the health or progress of the children, although he has visited them regularly at his parents' home in Rockingham, North Carolina. That the boys were being picked up for visitation by defendant's parents. That Agnes R. Lott hasn't contacted the defendant about the health or progress of the children during that time either.

14. That Paula L. Phillips is presently employed and able to pay \$100.00 a month child support.

15. That the delegation of the care and leaving of the two boys by their parents with Agnes R. Lott and the tacit understanding, agreement and consent that she keep the children are unusual circumstances and facts warranting a modification of the prior order so as to grant Agnes R. Lott custody.

16. That the defendant has failed to prove a change of circumstances sufficient to warrant an award of custody of the boys to himself, thereby modifying the prior order.

17. That as to the matter of child support, there has been a material and substantial change of conditions and that

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the best interests, welfare and reasonable needs of the minor children would be served by the plaintiff, Paula L. Phillips paying the sum of \$100 per month as child support and the defendant paying the sum of \$200 a month child support. That \$300 per month is necessary to meet the reasonable needs of the boys for their education and maintenance.

Based upon these findings of fact the court made the following relevant conclusions of law:

. . .

2. Considering the care and attention presently being received by the children at the home of Agnes R. Lott and the care and attention that they have received there during the past three and one-half years, and considering the tacit understanding and the leaving of the children with Agnes R. Lott, that this constitutes an unusual set of circumstances warranting the granting of custody to Agnes R. Lott.

3. That all of the parties are suitable and proper persons to have custody of and visitation with the two boys, but that the best interests and welfare of the boys would be served and promoted by granting custody to Agnes R. Lott, their grandmother, under the unusual facts and all of the circumstances of this case.

4. That the boys have reasonable needs of \$300 a month for their support to provided [sic] for their health, education and maintenance, and that their natural parents are able to provide said sum from their earnings. That the defendant is able to pay \$200 a month toward the support of the boys and Paula L. Choplin Phillips is able to pay \$100 a month toward the support of the boys.

Consistent with these conclusions, the court granted Agnes R. Lott full care, custody and control of the minor children, and ordered defendant to pay \$200 per month child support.

[1] Defendant first contends that the court erred "in failing to award the custody of the two children in question to their father and in awarding the custody instead to the grandmother, when the father was found by the court to be a fit and proper person to have the custody of the said children." N.C. Gen. Stat. Sec. 50-13.2(a) in pertinent part states:

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An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child. An order awarding custody must contain findings of fact which support the determination by the judge of the best interest of the child. . . .

It is a well established principle "that the natural parent is presumed to be the appropriate custodian of his or her child as opposed to third persons . . . ;" however, "[i]t is entirely possible that a natural parent may be a fit and proper person to care for the child but that all other circumstances dictate that the best interests of the child would be served by placing custody in a third party." *In re Kowalzek*, 37 N.C. App. 364, 367, 368, 246 S.E. 2d 45, 47, *disc. rev. denied and appeal dismissed*, 295 N.C. 734, 248 S.E. 2d 863 (1978). The trial judge is vested with broad discretion in child custody cases. The "paramount consideration" which limits this discretion is the welfare and needs of the children. *In re Peal*, 305 N.C. 640, 290 S.E. 2d 664 (1982).

The court found as a fact and concluded as a matter of law that the best interests of the children would be served by placing them with their grandmother, Mrs. Lott. A trial judge's decision will not be upset in the absence of a clear abuse of discretion if the findings are supported by competent evidence. *Comer v. Comer*, 61 N.C. App. 324, 300 S.E. 2d 457 (1983); *Sheppard v. Sheppard*, 38 N.C. App. 712, 248 S.E. 2d 871 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979). The court's findings of fact and conclusions are clearly supported by evidence in the record. There is no evidence of an abuse of discretion. It is clear that the court considered all the evidence presented, including the desires of the children to live with their grandmother, and found that the best interests of the children would be served by awarding custody to Mrs. Lott. We are, therefore, compelled to find that the assignments of error are without merit.

Defendant next argues that the court's findings of fact Nos. 3, 4, 7 and 13 were not supported by competent evidence, and that the court committed reversible error by reaching conclusions of law based upon these findings. A court's findings of fact as to the care and custody of children will not be disturbed when sup-

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ported by competent evidence, even if there is conflicting evidence. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). We have carefully reviewed the transcript and the record, and we find competent evidence to support each of the findings of fact to which defendant objects. The assignment of error is overruled.

[2] Defendant finally contends that the court erred "by allowing the plaintiff Lott's motion for an increase in child support to be paid by the defendant, when plaintiff Lott had failed to sustain her burden of establishing a substantial change in circumstances which would warrant a modification of the court's previous order." N.C. Gen. Stat. Sec. 50-13.7 in pertinent part provides: "An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." The court found as a fact that "there has been a material and substantial change of conditions and that the best interests, welfare and reasonable needs of the minor children would be served by . . . the defendant paying the sum of \$200 a month child support." This finding of fact is supported by evidence in the record that defendant's income has increased because he has taken a part-time job which pays him between \$100 and \$224 per month, and by evidence that debts from his prior marriage have been paid off and he is no longer required to make those payments as he was when the amount of the support obligations were originally set. Even though the court found that the children's needs were not as great as they were when the prior decrees were entered, the court did not abuse its discretion in ordering defendant to pay increased support, because the prior support payments were not adequate to meet the needs of the children as now found by the court. Defendant does not object to the court's findings regarding the needs of the children. The ultimate objective in support matters is to secure support commensurate with the needs of the children and the ability of the father to meet the needs. *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E. 2d 77, 79 (1967). The court by its findings, conclusions and order attempts to obtain this objective. The evidence supports the findings, the findings support the conclusions, and the conclusions support the judgment. The assignment of error is, therefore, overruled.

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Affirmed.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. MARK YANANOKWIAK

No. 8312SC398

(Filed 20 December 1983)

Searches and Seizures § 7— warrantless search—no exigent circumstances—circumstances requiring warrant

In a prosecution for felonious possession of marijuana with intent to sell, trafficking in cocaine and conspiracy to traffic in cocaine, the trial judge correctly concluded that the warrantless entry into defendant's home violated defendant's Fourth Amendment rights where the evidence tended to show that police could easily have obtained sufficient information to constitute probable cause before arriving at defendant's home, there was insufficient evidence of exigent circumstances to excuse the warrantless entry, and defendant's signed consent form was "tainted" by the original illegal entry.

APPEAL by plaintiff from *Battle, Judge*. Order entered 7 February 1983 in CUMBERLAND County Superior Court. Heard in the Court of Appeals 30 November 1983.

Defendant was arrested without a warrant in his Fayetteville home on 26 August 1982 and charged with felonious possession of marijuana with intent to sell, trafficking in cocaine and conspiracy to traffic in cocaine. More than twenty-eight ounces of cocaine, an undisclosed amount of marijuana and drug paraphernalia were seized during a warrantless search of defendant's residence following his arrest.

The facts found in the trial court's order granting defendant's motion to suppress are in summary as follows. Officer W. H. Simons of the Cumberland County Bureau of Narcotics and an anonymous informant attempted to buy cocaine from a man named Mark Klouda in a Fayetteville shopping center in the early evening of 26 August 1982. Klouda was arrested when he agreed to sell Simons two ounces of cocaine for \$3,800.00. Shortly thereafter, while at the police station, Klouda agreed to help Simons arrest his drug supplier, whom Klouda identified as de-

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fendant, Mark Yananokwiak. Klouda did not know defendant's exact street address, but offered to guide police to the house. Accordingly, Klouda was equipped with a concealed microphone and, accompanied by a number of undercover agents and Simons, drove to defendant's home. Klouda entered the home and police heard him tell defendant that he had made the sale and that the money was outside in his car. Klouda emerged from the house, retrieved the \$3,800.00, and went back into defendant's house. Police then heard Klouda say, "they want another ounce; here's your money," followed by the sounds of someone counting money and shaking something. Police next heard Klouda ask, "[i]s that enough for a whole ounce? Is it as good as the other stuff? . . . What's that?" A voice identified as defendant's responded, "[the] [c]ut."

The waiting undercover agents then rushed into the kitchen of defendant's home, where they found defendant bending over a scale, mixing white powder with a playing card. Defendant was arrested and, after about five minutes, agreed to permit officers to search the home, resulting in the discovery of drugs and paraphernalia in a back bedroom.

The trial judge concluded that the warrantless entry into defendant's home violated defendant's Fourth Amendment rights. From the trial judge's order granting defendant's motion to suppress, the state has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for the State.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, for defendant.

WELLS, Judge.

The state, in arguing that the trial judge erred in granting defendant's motion to suppress evidence seized in his home following his arrest, first contends that there was no probable cause to arrest defendant or search his home until the police actually overheard Klouda's conversation with defendant, and that therefore they could not have obtained a warrant before that time. Second, the state contends that once the police had probable cause, exigent circumstances existed which eliminated the need for a

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warrant. We disagree with both aspects of the state's argument and affirm the trial court's order.

The controlling test for determining when police have probable cause to arrest or to search, based upon information received from confidential informants is set forth in *Illinois v. Gates*, --- U.S. ---, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983). In *Gates*, the Supreme Court held that courts should review the "totality of the circumstances" in determining whether there was probable cause for issuance of a search warrant. The *Gates* opinion overrules the more rigid two-pronged Aguilar-Spinelli test which required affidavits supporting a warrant to demonstrate (1) the basis of the tipster's knowledge and (2) past reliability of the tipster. Under *Gates*, the Aguilar-Spinelli factors remain relevant but are not the sole factors in determining if probable cause is present.

In the case before us, we hold that the facts found show the police could easily have obtained sufficient information to constitute probable cause before arriving at defendant's home. The county narcotics bureau had received a number of anonymous telephone calls indicating that a young enlisted man was selling cocaine in the Fayetteville area. This information was further corroborated by the tipster who accompanied Simons to "buy" drugs from Klouda, and who had proven very reliable in the past. Next, Klouda supplied Simons with information which corroborated what Simons already knew, and revealed the name of his drug supplier. Although Klouda had not established a "track record" of reliable tips, it was clearly in his own interest to be truthful with police in this instance. The state argues that Klouda did not know defendant's exact address, and therefore there was insufficient information to obtain a warrant. It would have been an easy matter, however, for the police to go with Klouda to defendant's home, get the exact address and then obtain a warrant while other agents watched the house. The evidence before the trial court showed that several hours elapsed between Klouda's arrest and the time when police entered defendant's home, giving them ample time in which to obtain a warrant.

We turn now to the state's contention that once probable cause to arrest defendant was established, exigent circumstances were also present, excusing police from obtaining a warrant.

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The standard for warrantless home arrests was set out in *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980). In *Payton*, the Supreme Court held that the Fourth Amendment bars police from making a warrantless, nonconsensual entry into a suspect's home to carry out a routine felony arrest, in the absence of exigent circumstances. While setting out a broad rule, the Supreme Court refused to define exigent circumstances explicitly. Larkin, *Exigent Circumstances for Warrantless Home Arrests*, 23 Ariz. L. Rev. 1171 (1981). Most of the development of the term, therefore, has occurred in decisions of lower courts. *Id.* Courts have developed two somewhat different methods of determining when exigent circumstances exist. The so-called "checklist" approach was developed in *Dorman v. United States*, 435 F. 2d 385 (D.C. Cir. 1970), and has been followed by the courts of many states, including North Carolina. *State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979). The *Dorman* checklist consists of the following factors: (1) a grave offense is charged, (2) reasonable belief that the defendant is armed, (3) more than "minimal" probable cause to believe defendant is guilty, (4) reasonable belief that defendant is on the premises to be searched, (5) likelihood defendant will escape, if not arrested swiftly and (6) entry may be made peacefully. Other courts, however, approach the problem using a more traditional, broader "totality of the circumstances" test. Harbaugh & Faust, *Knock on Any Door—Home Arrests After Payton and Steagald*, 86 Dick. L. Rev. 191 (1982). Although still widely used, the *Dorman* checklist test has been justifiably criticized by a number of commentators. See, e.g., Larkin, *supra*; Harbaugh & Faust, *supra*; Donnino & Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Albany L. Rev. 90 (1980); 2 LaFave *Search and Seizure*, § 6 (1978).

One criticism of the checklist approach is that it is impractical and cannot be consistently applied by police in the field. Second, a number of the factors are outdated or irrelevant to the question of exigency. For instance, the element of peaceable entry is a conclusion made after the arrest occurs, and does not go to the issue of whether police are justified in entering without a warrant in the first place. The requirement of more than "minimal" probable cause again is irrelevant to the exigency issue and the belief that the suspect is at home is relatively mean-

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ingless since it is present in most cases, *Donnino & Girese, supra*. Further, at least two United States Supreme Court cases decided after *Dorman* have ignored several of the checklist factors. *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406, 49 L.Ed. 2d 300 (1976) and *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782 (1967) permitted warrantless seizures where there was no finding that the defendant was armed, or that more than "minimal" probable cause was present or that peaceful entry into the home was possible. Finally, the *Dorman* checklist makes no mention of hot pursuit or destruction of evidence, which are both commonly recognized as grounds for warrantless seizures. *Larkin, supra*. The third major criticism of the checklist approach is that it is too narrow and fails to take into account other important common-sense factors, such as whether officers make the entry in a reasonable manner and within the amount of time it would have taken them to obtain a warrant. *Harbaugh & Faust, supra*. For these reasons, we believe the totality of the circumstances test is the better approach, and is more in line with the broad *Gates* test.

Applying the "totality" test to the case before us, we hold there was insufficient evidence of exigent circumstances to excuse the warrantless entry into defendant's home. The state does not argue that exigent circumstances existed when police were at the law enforcement center with Klouda, nor do the facts indicate that police believed defendant was about to escape or destroy evidence. We hold further that exigent circumstances did not exist when police overheard the conversation between defendant and Klouda outside defendant's home. Klouda and defendant had conducted drug deals before, and there was no showing that defendant suspected Klouda of being an informant or was uneasy over the time lapse between Klouda's "sale" to Officer Simons and his return to defendant's home. Nor did the police hear anything which might reasonably lead them to conclude that defendant was about to escape or destroy evidence. The state's argument that exigency is shown simply because drugs are easily destroyed would permit the exigency exception to swallow the entire warrant requirement. Although the state notes that drug dealers frequently own guns or other weapons and are violent, there is no showing that this particular defendant was armed or was dangerous. It was of course obvious that police were not in

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"hot pursuit" of defendant as several hours had elapsed between the time police learned of defendant's name and the time when he was arrested. The only time at which exigent circumstances existed in this case was at the moment police entered defendant's home, thereby revealing that he was about to be arrested. This circumstance, however, was created by the police themselves and may not be presented as an argument to support their warrantless actions. *See Vale v. Louisiana*, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed. 2d 409 (1970).

Although not discussed in the state's brief, we note that defendant signed a consent form, permitting police to search his home about five minutes following his arrest. As a general rule, evidence obtained following an illegal intrusion into a defendant's home is "tainted" by the original illegal entry and is therefore inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). To be admissible, the evidence must be shown to be the product of "an intervening, independent act of free will . . ." *Id.* In *Wong Sun*, six or seven policemen broke down the door to defendant's home, chased defendant down the hall awakening his family, and immediately arrested and handcuffed defendant. Soon thereafter, defendant made inculpatory statements, which the state sought to introduce, despite the illegality of the initial entry into defendant's home. The United States Supreme Court determined that "[u]nder such circumstances it is unreasonable to infer that [defendant's] . . . response was sufficiently an act of free will to purge the primary taint of the unlawful invasion." *Id.* In the case before us, defendant signed the written consent form shortly after a number of officers stormed suddenly into his kitchen and placed him under arrest. We believe that these circumstances are sufficiently similar to *Wong Sun* to require us to conclude that defendant's consent to the search of his home was insufficiently independent of the illegal entry.

Because there was ample evidence to support the trial judge's findings of fact and because the findings of fact support the conclusion that defendant's Fourth Amendment rights were violated, the order of suppression must be

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Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. DONALD EUGENE SUMMERFORD AND
NANCY SMITH SUMMERFORD

No. 833SC347

(Filed 20 December 1983)

1. Constitutional Law § 28; Solicitors § 1— prosecution of husband and wife—offer to drop charges against wife for husband's guilty plea—no denial of due process

In a prosecution of a husband and wife for felonious possession and sale and delivery of narcotics, the district attorney's offer to dismiss the charges against the wife on condition that the husband plead guilty to one felony charge did not constitute an abuse of prosecutorial discretion or a deprivation of the wife's right to due process of law where the wife had already been indicted so there was probable cause to believe she had committed the offenses; the evidence showed and the jury found that the wife was a participant in the crimes; and the trial judge considered the wife's lesser degree of culpability in imposing sentence.

2. Constitutional Law § 48— effective assistance of counsel—same attorney representing husband and wife—offer to drop charges against wife for husband's guilty plea

The same attorney's representation of the female defendant and her husband on narcotics charges did not deny the female defendant the effective assistance of counsel because the district attorney offered to drop the charges against her if her husband would plead guilty to one felony charge where neither defendant objected before or during trial to joint representation, and there is no reason to believe that separate counsel could have changed the State's decision to prosecute the female defendant if her husband failed to plead guilty to a felony.

3. Constitutional Law § 48— effective assistance of counsel—same attorney representing husband and wife—difference in culpability

The same attorney's representation of the female defendant and her husband on narcotics charges did not deny the female defendant the effective assistance of counsel because the female defendant was less culpable than her husband where neither defendant testified, the defenses of the husband and wife were not antagonistic, and the trial judge took into account the wife's lesser culpability in imposing sentence.

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4. Constitutional Law § 48— effective assistance of counsel—same attorney representing husband and wife—payment of fees by husband's parents

The same attorney's representation of the female defendant and her husband on narcotics charges did not deny the female defendant the effective assistance of counsel because the husband's parents paid the attorney fee for both defendants where there was no evidence that defense counsel sacrificed the interest of the female defendant for that of her husband.

5. Constitutional Law § 48— effective assistance of counsel—failure to move for severance or request instructions

The female defendant was not denied the effective assistance of counsel by the failure of her attorney to move for a severance of her trial from that of her husband or by the failure of her attorney to request limiting instructions concerning evidence of an offense for which only the husband was charged.

6. Indictment and Warrant § 13— exact times of offenses—variance between bill of particulars and evidence—denial of motion to dismiss

The trial court properly denied defendant's motion to dismiss charges of felonious possession and sale and delivery of narcotics because information in a bill of particulars concerning the exact times of the offenses was at variance with the evidence at trial where the variance was due to inadvertent error by the assistant district attorney, defendant presented no alibi defense or any other evidence, and it does not appear likely that defense tactics would have been any different if the information in the bill of particulars had been consistent with the evidence at trial.

7. Constitutional Law § 48— effective assistance of counsel—same attorney representing husband and wife—no prejudice to husband

The same attorney's representation of the male defendant and his wife on narcotics charges did not deny the male defendant the effective assistance of counsel because the district attorney offered to drop the charges against his wife if the male defendant would plead guilty to one felony charge or because defense counsel pointed out the female defendant's lesser degree of culpability.

APPEAL by defendants from *Reid, Judge*. Judgments entered 28 October 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 17 November 1983.

The defendants Donald and Nancy Summerford, husband and wife, were indicted for the felonious possession with the intent to sell and deliver of 2 ounces of marijuana and the sale and delivery of marijuana on 9 February 1982. Donald Summerford was also indicted on identical charges occurring 4 February 1982. He was found guilty of both counts of sale and delivery and one count of possession. He received an active prison term of 6 months and 3 years 6 months of supervised probation. Nancy Summerford was found guilty as charged and received an active term of 5 days.

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She was also given a probationary period identical to her husband's. Both defendants appeal from the judgments imposed.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant Nancy Smith Summerford.

Public Defender Donald C. Hicks, III, for defendant Donald Eugene Summerford.

ARNOLD, Judge.

Defendant Nancy Smith Summerford's Appeal

[1] Defendant Nancy Summerford assigns error to the court's denial of the motion to dismiss the charges against her. She argues that the district attorney's offer to dismiss these charges on condition that her husband plead guilty to one felony charge, constituted an abuse of prosecutorial discretion and deprivation of her right to due process of law. We find no merit to this assignment of error.

During the sentencing hearing the defendants' attorney informed the trial court that prior to trial the district attorney had offered to drop the charges against the feme defendant if her husband would plead guilty to one felony. The district attorney had indicated to defense counsel that the State was not interested in prosecuting the feme defendant. When the homme defendant refused to accept this plea arrangement, defense counsel had countered with an offer to plead him guilty to a misdemeanor on condition that the charges against the feme defendant be dropped. The State refused to accept this counteroffer, and the parties proceeded to trial.

District attorneys possess wide discretion in deciding who will or will not be prosecuted.

In making such decisions, district attorneys must weigh many factors such as "the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and his own sense of justice in the particular case." (Citation omitted.) The proper exercise

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of his broad discretion in his consideration of factors which relate to the administration of criminal justice aids tremendously in achieving the goal of fair and effective administration of the criminal justice system.

State v. Spicer, 299 N.C. 309, 311-12, 261 S.E. 2d 893, 895 (1980). In deciding to prosecute the feme defendant, the district attorney did not abuse this discretion. The feme defendant already had been indicted, so there was probable cause to believe that she had committed the drug offenses. There is absolutely no basis to the feme defendant's argument that her prosecution was punishment for her husband's exercise of his right to a jury trial. The evidence showed, and the jury found, that the feme defendant was a participant in the crimes occurring on 9 February 1982.

The evidence before the jury was that an undercover agent came to defendants' house on the evening of 9 February 1982 and expressed a desire to buy marijuana. At her husband's direction, the feme defendant went to the bedroom and returned with a bag of marijuana. She handed the bag to the agent. When the agent paid for the marijuana, the homme defendant directed his wife to give him change and she complied. This evidence supports the conclusion that the defendants acted together for the common purpose of committing the drug offenses.

During the sentencing hearing the trial judge indicated that he had perceived that the State viewed the homme defendant to be more culpable than the feme defendant. He emphasized that he would not dismiss the charges against the feme defendant but would try to sentence the defendants with regard to their relative culpability. For her conviction of felonious possession and the sale and delivery of marijuana, the feme defendant received only a 5 day prison sentence. From the sentence imposed, there is no doubt that the trial judge considered the degree of her culpability. She was in no way denied due process of law.

[2] The feme defendant next argues that her 6th amendment right to effective assistance of counsel was violated, because both she and her husband were represented by the same attorney. She argues that conflicts of interest were raised during the plea bargain negotiations, by the differing degrees of culpability, and in the fact that defense counsel was paid by the homme defendant's parents. The feme defendant further argues that she was denied

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effective assistance of counsel because defense counsel failed to move for severance, or to request instructions that evidence of the 4 February 1982 crimes be limited to the homme defendant. We find no violation of her constitutional right to effective assistance of counsel.

We initially note that neither defendant objected before or during trial to joint representation. "In order to establish a conflict of interest violation of the constitutional right to effective assistance of counsel, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" *State v. Howard*, 56 N.C. App. 41, 46, 286 S.E. 2d 853, 857, *disc. rev. denied*, 305 N.C. 305, 290 S.E. 2d 706 (1982), quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L.Ed. 2d 333, 346-47, 100 S.Ct. 1708, 1718 (1980). The feme defendant has made no such showing.

A possible conflict of interest might have been raised during the plea negotiations if defense counsel had persuaded the homme defendant to plead guilty in order to save his wife from prosecution. In this situation the homme defendant, and not his wife, would be entitled to raise the issue of ineffective assistance of counsel. Moreover, it is obvious that if the homme defendant had been represented by separate counsel, he would not have been advised to plead guilty to one felony for his wife's benefit. It is equally obvious from the record that the State was willing to dismiss the charges against the feme defendant only if her husband pleaded guilty to one felony. There is no reason to believe that separate counsel could have changed the State's decision to prosecute the feme defendant.

[3] The difference in culpability between the defendants also did not raise any conflict of interest which adversely affected defense counsel's representation of the feme defendant. "Multiple defendants, almost by definition, will produce disparities, qualitatively and quantitatively, as to proof against each. It is a *non sequitur* to say that such disparity *ipso facto* results in disparity of effort devoted to such defendants if they have the same attorney." *People v. Smith*, 19 Ill. App. 3d 138, 144, 310 N.E. 2d 818, 823 (1974). In the case on appeal, neither defendant testified, nor were there antagonistic defenses. The mere fact that the feme defendant was less culpable than her husband did not hinder counsel from effec-

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tively representing either defendant. Furthermore, the trial judge noted at the sentencing hearing that he was aware of this unequal culpability. His imposition of a 5-day active sentence for crimes which carry maximum sentences of 5 years each undeniably shows that the feme defendant's lesser degree of culpability was considered. See *State v. Willis*, 61 N.C. App. 244, 300 S.E. 2d 829 (1983).

[4] We also find no conflict of interest caused by the payment of attorney's fees for both defendants by the homme defendant's parents. There is no evidence that defense counsel sacrificed the interest of the feme defendant for that of her husband.

[5] Finally, we do not find that the feme defendant was denied effective assistance of counsel because defense counsel did not move for severance or request instructions that evidence of the 4 February 1982 crimes be limited to the homme defendant. The feme defendant has not shown that the joint trial deprived her of a fair trial. See *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). In any respect, defense counsel's failure to move for severance "amounts to nothing more than a mistaken tactical decision and does not constitute such incompetency as to deny defendant effective assistance of counsel." *State v. Arsenault*, 46 N.C. App. 7, 12, 264 S.E. 2d 592, 595 (1980). Defense counsel's failure to request limiting instructions regarding the 4 February 1982 offense clearly was not prejudicial, since the feme defendant was not charged with these offenses.

Defendant Donald Eugene Summerford's Appeal

[6] Prior to trial defense counsel filed a motion for a bill of particulars on behalf of the homme defendant requesting information about the alleged possessions and sales of marijuana on 4 and 9 February 1982. The district attorney responded in the bill of particulars that the 4 February 1982 possession and sale occurred at 10:45 p.m.; and that the 9 February 1982 offenses occurred at 5:45 p.m. At trial the State's evidence was that the 4 February 1982 possession and sale occurred at approximately 5:45 p.m. The State's witness testified that the 9 February 1982 offenses occurred at 10:45 p.m. At the close of the evidence, defense counsel moved for dismissal of the charges because the information in the bill of particulars was at variance with the evidence at trial. The

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court denied this motion, and the homme defendant has assigned error to its denial.

In denying the motion to dismiss, the trial judge noted that the variance regarding the times of the offenses was due to inadvertent error by the assistant district attorney. He emphasized that neither defendant had been prejudiced by the variance because they had not relied upon any alibi defense. We agree. "The purpose of a bill of particulars is to give an accused notice of the specific charge or charges against him and to apprise him of the particular transactions which are to be brought in question on the trial." *State v. Johnson*, 30 N.C. App. 376, 377, 226 S.E. 2d 876, 878, *disc. rev. denied*, 291 N.C. 177, 229 S.E. 2d 691 (1976). This purpose was not thwarted in the case on appeal, since neither defendant presented an alibi defense nor any other evidence and since the time variance was merely 5 hours. It does not appear likely that defense tactics would have been any different if the information in the bill of particulars had been consistent with the evidence at trial. *See, State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). No error has been shown.

[7] The homme defendant, like his wife, also argues that he was denied effective assistance of counsel because of their joint representation. He first argues that the conflict of interest in the plea bargaining process adversely affected defense counsel's representation of him. He next argues that defense counsel minimized the feme defendant's involvement in the crimes at his expense.

As we noted in our discussion of the feme defendant's appeal, the homme defendant could possibly show a conflict of interest in the plea negotiations only if he had pleaded guilty in return for dismissal of the charges against his wife. The homme defendant, however, refused to plead and exercised his right to a jury trial.

During the trial, both the district attorney and defense counsel pointed out the feme defendant's lesser degree of culpability. We reiterate that this fact alone does not establish that defense counsel was unable to represent both defendants effectively. In fact, the record shows that the homme defendant received more than adequate representation. The trial judge commented upon this representation at the close of the sentencing hearing:

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The Court congratulates you, Mr. Ward on the sterling job that you did and the very forceful and able manner in which you advanced the cause of your clients' cases. You were able to, as I said, to strip Mr. Summerford of one five-year felony which was lodged against him.

Both defendants received vigorous and effective representation.

No error.

Judges HILL and BRASWELL concur.

JOSEPH W. FREEMAN, JR., GUARDIAN AD LITEM, FOR DAWN FRANCE, MINOR, ANGELA MOXLEY, WILLIAM FRANCE, LINDA FRANCE, AND NADINE M. BARE v. AARON PAUL FINNEY, BETTY SMITH FINNEY, LAUNE STEPHAN EARY, JODI LYNN LANDRETH, JOHN DOE, AND (TALMADGE L. WOODEL)

WILLIAM R. ZWIGARD, ADMINISTRATOR OF THE ESTATE OF TODD DOUGLAS ZWIGARD, DECEASED v. MOBIL OIL CORPORATION, D/B/A REELO, JAMES HYDE WILSON, JR. AND JAMES HYDE WILSON, SR.

Nos. 8223SC1029 and 8321SC336

(Filed 20 December 1983)

Automobiles and Other Vehicles § 43; Intoxicating Liquors § 24; Negligence § 1.3 — selling beer to minors — possible liability for ensuing accident — granting motions to dismiss improper

A vendor who sells malt beverages to a minor under 18 can be held liable to a third party negligently injured or killed by an intoxicated minor as the result of an automobile collision; therefore, where two separate plaintiffs properly alleged the cause of action based upon the sale of malt beverage to a person under the age of 18 years of age, the trial courts erred in granting the separate defendants' motions to dismiss or for judgments on the pleadings. G.S. 18A-56, G.S. 18A-8 and G.S. 18B-121.

APPEAL by plaintiff, *Freeman, Jr.*, from *Rousseau, Judge*. Judgment entered 20 July 1982 in Superior Court, ALLEGHANY County. Appeal by plaintiff, *Zwigard*, from *Wood, Judge*. Judgment entered 10 February 1983 in Superior Court, FORSYTH Coun-

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ty. Cases consolidated and heard in the Court of Appeals 26 September 1983.

These cases, consolidated on appeal, present the question of whether a vendor who sells malt beverages to a minor under eighteen can be held liable to a third party negligently injured or killed by an intoxicated minor as the result of an automobile collision.

In the first case, plaintiff, Joseph W. Freeman, Jr., Guardian *Ad Litem* for Dawn France, a minor, alleges, in essence, that some time prior to 10:30 p.m. on 19 December 1980, an employee at Southside Produce, a store owned by defendant, Talmadge Woodel, sold beer to a minor under the age of eighteen. The minor, thereafter, became intoxicated and negligently drove his automobile into another automobile, injuring plaintiff, an occupant therein.

On 15 April 1982, a consent judgment was entered among the parties involved, which did not include defendant Woodel. On 20 July 1982, the court granted defendant Woodel's motion for judgment on the pleadings, with the costs of litigation taxed to plaintiffs. From this order, plaintiff appeals.

In the second case, plaintiff, William R. Zwigard, Administrator of the estate of his deceased son, Todd Douglass Zwigard, alleges, in essence, that around 1:30 p.m. on 8 November 1981, an employee at "Reelo," a convenience store with self-service gas pumps, owned by defendant, Mobil Oil, sold a six-pack of beer to a minor. The minor, in turn, gave some beer to her friend and driver, also a minor. As a result, the minor driver became intoxicated, lost control of the automobile he was driving and went off the road, striking and killing plaintiff's son, who was sitting on his bicycle at the curb.

On 10 February 1983, the court granted defendant's motion to dismiss the complaint, pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted. From this order, plaintiff appeals.

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E. Vernon F. Glenn and David P. Shouvin, for plaintiff appellant, Joseph W. Freeman, Jr., et al.

Morrow and Reavis, by John F. Morrow; and Womble, Carlyle, Sandridge and Rice, by Jimmy H. Barnhill and Juanita H. Blackmon, for plaintiff appellants.

Vannoy and Reeves, by Wade E. Vannoy, Jr., for defendant appellee, Talmadge L. Woodel.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by R. M. Stockton, Jr. and John F. Mitchell, for defendant appellee, Mobil Oil Corporation.

VAUGHN, Chief Judge.

G.S. 18A-8, in effect at the time of both actions, makes it a crime for any person, firm or corporation knowingly to sell or give malt beverages or unfortified wine to any person under eighteen years of age. Violation of such statute is a misdemeanor. G.S. 18A-56. There is no question that defendants in both actions violated the statute; the question before this Court is whether defendants can be subjected to civil liability for automobile accidents caused by the negligence of intoxicated minors who purchased malt beverages from defendants. For the reasons set forth below, we hold that plaintiffs' claims were improperly dismissed; whether plaintiffs can prove a cause of action against defendants is a matter for the jury to determine from the attendant circumstances, not for the court to determine as a matter of law.

To make out a prima facie case of common law negligence plaintiffs must establish:

- (1) that defendants had a duty or obligation recognized by the law, requiring them to conform to a certain standard of conduct, for the protection of others against unreasonable risks;
- (2) a failure on defendants' part to conform to the standard required;
- (3) a reasonably close causal connection between defendants' conduct and plaintiffs' injuries; and
- (4) actual loss or damage.

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Hutchens v. Hankins, 63 N.C. App. 1, 13, 303 S.E. 2d 584, 592, review denied, 309 N.C. 191, 305 S.E. 2d 734 (1983), quoting W. Prosser, *The Law of Torts*, § 30, p. 143 (4th ed. 1971).

G.S. 18A-8 imposes upon defendants a duty or obligation not to sell beer to minors. The purpose of this statute is to protect both the minor and the community at large from the possible adverse consequences of the minor's intoxication. See *Hutchens*, *supra*. When a statute, such as the one in this case, imposes upon a person a specific duty for the protection of others, a violation of such statute constitutes negligence *per se*. *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E. 2d 333 (1955); *Hutchens*, *supra*. Defendants, in other words, were negligent as a matter of law when they failed to conform to the standard imposed by G.S. 18A-8. It is up to plaintiffs, however, to prove that defendants' negligence was a proximate cause of their injuries.

The test of proximate cause is whether a person of ordinary prudence could have reasonably foreseen the actual results or similar injurious results from their negligent conduct. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Although plaintiffs' injuries were a direct result of the minors' negligent driving, there can be more than one proximate cause of an injury. *Hutchens*, *supra*; *Hester v. Miller*, 41 N.C. App. 509, 255 S.E. 2d 318, review denied, 298 N.C. 296, 259 S.E. 2d 913 (1979). A person may be held liable if his negligent conduct was a substantial, foreseeable cause of another's injuries. See *Watters v. Parrish*, 252 N.C. 787, 115 S.E. 2d 1 (1960). Defendants should not be insulated from liability as a matter of law merely because their conduct was, if anything, an indirect cause of plaintiffs' injuries. Nor should defendant in the second case be insulated from liability merely because he did not sell beer to the driver, but sold it to another minor who, in turn, gave the beer to the driver. Defendants' negligent conduct, in both cases, started the chain of events leading to plaintiffs' injuries. The question of whether defendants should have foreseen the injurious consequences from their negligent conduct and whether their conduct was a substantial cause of plaintiffs' injuries cannot be discarded as a matter of law on a motion to dismiss or for judgment on the pleadings.

Defendants cite a case decided in 1913 for the proposition that plaintiffs have no cause of action against defendants. In

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Spencer v. Fisher, 161 N.C. 116, 76 S.E. 731 (1913), our Supreme Court interpreted a civil damage statute, in effect at the time, making it a misdemeanor for a dealer to sell intoxicating liquors to an unmarried minor and giving the father, or if he be dead, the mother, guardian, or employer of such minor a right of action against the dealer if injurious consequences followed from the sale. In *Spencer*, liquor had been shipped, with a minor receiving the bill of lading for the shipment from a bank cashier. The Court strictly construed the word "dealer" in the statute, so as not to impose liability on the bank cashier. In *dicta*, the Court explained that a cause of action under such statute was governed wholly by its provisions, *there being no cause of action at common law. Id.* at 117, 76 S.E. at 732. (Emphasis added.) The civil damage statute in the *Spencer* case, later codified as G.S. 14-332 remained in effect until 1971 when the General Assembly repealed this statute. When plaintiffs' claims arose in the instant cases, we had no civil damage statute.

We do not find the *Spencer* decision to be on point or its *dicta* to be controlling. As we have explained in the past:

The doctrine of *stare decisis* contemplates only such points as are actually involved and determined in a case, and not what is said by the Court . . . on points not necessarily involved therein. Such expressions, being, *obiter dicta*, do not become precedents It cannot be reasonably expected that every word, phrase, or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied

Moose v. Commissioners, 172 N.C. 419, 433-34, 90 S.E. 441, 448-49 (1916) quoting 7 R.C.L., 1000, 3, 4, *cited with approval* in *Hayes v. Wilmington*, 243 N.C. 525, 536, 91 S.E. 2d 673, 682 (1956). We adhere to the rationale adopted by the Minnesota Supreme Court to the effect that in 1913, when the *Spencer* decision was rendered, it could be said as a matter of law that the commingling of alcohol and horses did not produce a foreseeable injury. In 1980 and 1981, however, when plaintiffs' claims arose, the commingling of alcohol and horsepower presented a different situation in which

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the reasonably prudent person might have foreseen the possible injurious consequences. See *Trail v. Christian*, 298 Minn. 101, 111, 213 N.W. 2d 618, 624 (1973), citing *Garcia v. Hargrove*, 46 Wis. 2d 724, 737, 176 N.W. 2d 566, 572 (1970) (Hallows, C.J., dissenting).

That the jury, not the judge, should determine the question of defendants' liability has been stated by our courts in two recent cases presenting parallel situations. In *Chastain v. Litton Systems, Inc.*, 694 F. 2d 957 (4th Cir. 1982), cert. denied, U.S., 103 S.Ct. 2454, 77 L.Ed. 2d 1334 (1983), defendant furnished alcohol to an employee at a Christmas party, allowing him to become intoxicated and then to drive home. The employee, while intoxicated, ran a red light and caused the death of another driver. The Fourth Circuit Court of Appeals, applying North Carolina law, reversed an order granting defendant's motion for summary judgment. The Court discussed the issue of proximate cause and concluded that if defendant were a business host, then its negligence would not be insulated as a matter of law by the negligence of its intoxicated guest who injured another.

In *Hutchens, supra*, an employee of defendant, the owners and operators of a tavern, furnished alcoholic beverages to an intoxicated customer, who, as a result of such intoxication, negligently drove his automobile, injuring plaintiffs. After extensive analysis, this Court reversed the trial court order granting defendant's motion to dismiss:

If we assume, as we must, to test the sufficiency of the complaint, that the defendant tavern owners unlawfully and negligently sold malt beverages to [the customer] which resulted in his intoxication, which in turn caused or contributed to his negligent operation of the motor vehicle at the time of the accident, then a jury could reasonably find that the plaintiffs' injuries resulted in the ordinary course of events from defendants' negligence and that such negligence was, in fact, a substantial factor in bringing them about.

63 N.C. App. at 26, 303 S.E. 2d at 599. We adopt and expand the reasoning from *Chastain* and *Hutchens* in finding that plaintiffs hereunder have alleged a common law cause of action against defendants.

Had the accidents in the instant cases occurred after 1 October 1983, there would be no question but that plaintiffs would

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have alleged a cause of action arising under the dram shop provisions of the "Safe Roads Act," enacted by the General Assembly on 3 June 1983. Safe Roads Act, ch. 435, 1983 N.C. Sess. Laws (to be codified as G.S. 18B-120, *et seq.*). A provision, to be codified as G.S. 18B-121, gives persons who sustain injury as a consequence of the actions of an underage person a claim for relief against a permittee or local Alcoholic Beverage Control Board if:

- (1) The permittee or his agent or employee or the local board or its agent or employee negligently sold or furnished an alcoholic beverage to an underage person; and
- (2) The consumption of the alcoholic beverage that was sold or furnished to an underage person caused or contributed to, in whole or in part, an underage driver's being subject to an impairing substance within the meaning of G.S. 20-138.1 at the time of the injury; and
- (3) The injury that resulted was proximately caused by the underage driver's negligent operation of a vehicle while so impaired.

For the reasons we have heretofore stated, plaintiffs have alleged a cause of action existing independent of this new statutory right. What they can prove, however, is another matter. For the reasons stated, the judgments from which the plaintiffs appeal are reversed.

Reversed.

Judges WHICHARD and PHILLIPS concur.

WINSTON-SALEM JOINT VENTURE v. CITY OF WINSTON-SALEM AND FORSYTH COUNTY

No. 8321SC83

(Filed 20 December 1983)

1. Rules of Civil Procedure § 26— denial of motion to enlarge discovery period

The trial court did not abuse its discretion in the denial of defendants' motion to enlarge the discovery period where defendants failed to show good

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cause for their delay in commencing discovery. Rule 8 of the General Rules of Practice for the Superior and District Courts.

2. Evidence § 28.2— property tax listings—failure to authenticate

The trial court did not err in the exclusion of personal property tax listings offered by defendants where defendants failed to authenticate such exhibits.

3. Witnesses § 8.3— scope of cross-examination

In an action to recover a penalty imposed for plaintiff's late listing of its real property for tax purposes, the trial court did not err in permitting plaintiff to cross-examine the county tax supervisor about events which occurred between the supervisor and another witness at earlier stages of the proceeding, about complaints the supervisor had received from other citizens concerning late listing penalties on their tax bills, and about directives the supervisor had received concerning a review of defendants' tax listing procedures.

4. Trial § 40.1— form of issue—waiver of objection

Plaintiff waived its right to object to the form of the issue submitted to the jury by failing to object thereto at the trial. Moreover, the issue submitted to the jury was sufficient where it settled all material controversies which arose out of the pleadings when considered in light of the court's instructions to the jury. G.S. 1A-1, Rule 49(c).

5. Trial § 50.1— newspaper article about jury—denial of motion for new trial

The trial court properly denied defendants' motion for a new trial based on a newspaper article purporting to show that the jury misunderstood or misapplied the law in the case.

APPEAL by defendants from *Rousseau, Judge*. Judgment entered 1 September 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 December 1983.

This is a civil action wherein the plaintiff seeks to recover a late listing penalty that was levied because of plaintiff's alleged failure to list its real property for tax purposes. Summary judgment was granted for defendants. This Court reversed that judgment by a decision reported in 54 N.C. App. 202, 282 S.E. 2d 509 (1981). The case was tried before Judge Rousseau and a jury on 24 August 1982. A verdict was returned in plaintiff's favor, and judgment was entered on the verdict. Defendants filed a motion for a new trial. The motion was denied. Defendants appealed.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by G. Gray Wilson and Michael L. Robinson, for the plaintiff, appellee.

P. Eugene Price, Jr., and Jonathan V. Maxwell, for the defendants, appellants.

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HEDRICK, Judge.

[1] Defendants first contend that the court erred "in denying defendants' motion to enlarge the discovery period and in ruling that plaintiff's motion for protective order was moot, thereby depriving defendants of any opportunity for discovery in this case." This action was filed on 26 February 1980 and defendants' answer, the last required pleading, was filed on 1 May 1980. On 30 June 1980 defendants filed a motion for summary judgment. On 17 November 1980 summary judgment was entered for the defendants. This Court in an opinion filed 6 October 1981 reversed the judgment and remanded the cause for trial. Defendants' petition for discretionary review was denied by the Supreme Court of North Carolina on 12 January 1982. On 23 March 1982, defendants served interrogatories on the plaintiff. On 21 April 1982, plaintiff sought a protective order. On 28 April 1982 defendants filed a response to the motion for a protective order and a motion to enlarge the time for discovery. On 13 May 1982 Judge Albright entered an order denying the motion to enlarge the discovery period. This order rendered plaintiff's motion moot.

Rule 8 of the General Rules of Practice for the Superior and District Courts states:

All desired discovery shall be completed within 120 days of the date of the last required pleading. For good cause shown, a judge having jurisdiction may enlarge the period of discovery.

Counsel are required to begin promptly such discovery proceedings as should be utilized in each case, and are authorized to begin even before the pleadings are completed. Counsel are not permitted to wait until the pre-trial conference is imminent to initiate discovery.

The 120 day period for the completion of discovery expired on 29 August 1980. This was almost three months prior to the order granting summary judgment for the defendants and more than eighteen months prior to defendants' attempt to initiate discovery. The court may for good cause shown enlarge the discovery period. The decision as to whether to enlarge this period is clearly within the sound discretion of the judge, and his decision will not be disturbed absent a showing of an abuse of

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discretion. Defendants have failed to show good cause for their delay in commencing discovery. They have failed to carry their burden of showing that the court below abused its discretion. Absent this showing their assignment of error must be overruled. Even if the court erred in denying the defendants' motion, we are unable to find any prejudice that resulted from its decision. The assignment of error is, therefore, overruled.

[2] Defendants next contend that the court erred by refusing to admit two defense exhibits into evidence for impeachment purposes. Plaintiff offered evidence from Mr. Gudín who was responsible for listing the real property in question during the 1978 tax year. Mr. Gudín testified that he completed the tax form, that the form was placed in a pre-addressed envelope provided by the defendants, and that the envelope was placed in his company's outgoing mail. In an earlier affidavit, filed in opposition to defendants' motion for summary judgment, Gudín stated that "in my 12 years with this company, Jacob, Visconsi and Jacob has handled hundreds of listings and have never missed a filing or payment date." Defendants on cross-examination questioned Gudín concerning the affidavit. Gudín acknowledged that he made the statements in the affidavits and testified that to his knowledge the statements were correct. Defendants then showed Gudín late personal property tax listings from 1976 and 1978. Gudín disavowed any knowledge of these listings and stated that he did not know whether Jacob, Visconsi and Jacob listed them and that he did not know what the listing deadlines were for personal property. Defendants then attempted to introduce the listing forms into evidence as defendants' exhibits 1 and 2. The court refused to admit the exhibits. Defendants argue that they were entitled to have the jury consider those exhibits as they relate to the credibility of Gudín.

Assuming *arguendo* that defendants were entitled to use the exhibits to attack the credibility of Gudín, they must be authenticated by extrinsic evidence in order to be admissible into evidence. A public document may be authenticated by direct evidence of its execution, by an adverse party's admission of genuineness, by proof of its qualification as a business record, by proof of handwriting or typewriting, by proper certification, by official publication or by other circumstantial evidence. 2 *Brandis on North Carolina Evidence*, Sec. 195 (2d Rev. Ed. 1982). A review

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of the record reveals that defendants failed to authenticate their exhibits by any of these methods. The assignment of error is overruled.

[3] Defendants by their next assignment of error contend the court erred by allowing plaintiff to cross-examine Mr. Pardue, the tax supervisor, about events which occurred between Mr. Gudin and the witness at earlier stages of the proceeding, about complaints the witness had received from other citizens regarding late listing penalties on their tax bills, and about directives the witness had received from the County Commission regarding a review of the defendants' tax listing procedures. In North Carolina the scope of cross-examination is quite broad.

[C]ross-examination may ordinarily be made to serve three purposes: (1) to elicit further details of the story related on direct, in the hope of presenting a complete picture less unfavorable to the cross-examiner's case; (2) to bring out new and different facts relevant to the whole case; and (3) to impeach the witness, or cast doubt upon his credibility.

1 Brandis on North Carolina Evidence, Sec. 35, at 145 (2d Rev. Ed. 1982). The questions objected to by defendants clearly fall within the realm of proper cross-examination. This assignment of error is without merit.

[4] Defendants next contend that the court erred by submitting the following issue to the jury: "Did plaintiff timely list its real property with defendants in 1978?" Defendants had originally requested that two issues be submitted to the jury. These issues were: "Did plaintiff deposit a real property tax listing in the United States mail in time to be received by the defendants on or before March 2, 1978?" and "If the listing was timely deposited in the United States mail by the plaintiff, did defendants in fact receive plaintiff's real property listing on or before March 2, 1978?" The following exchange occurred at the charge conference:

COURT: What do you say the issues are, gentlemen?

MR. WILSON: The one I tendered your Honor and I believe Mr. Maxwell's already tendered two to the Court. They're all before the Court.

COURT: Do you want to be heard on it?

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MR. MAXWELL: Your Honor, I think the two that we tendered, the jury has to decide whether there was, in fact, a mailing in time and if they believe that, that raises a prima facie case that can be rebutted if they believe our evidence that it was not received. So the issues are was it mailed timely and was it, in fact, received.

MR. WILSON: Your Honor, I think we're talking about two sides of the same coin. I think it would be appropriate for the Court to instruct under the issue I tendered all of the elements the jury has to find in order to find there was a timely listing, that is, whether or not it was put in the mail in time and also, if there was enough time, assuming that evidence was true for it to be received.

COURT: They would have to find timely deposit in the United States mail and if it was, then they would have to consider whether it was received—

MR. WILSON: That's correct too.

COURT: —on or about March 2nd. All right, do you have any request for instructions?

MR. MAXWELL: I just tendered some on the issue of receipt your Honor, it could be adapted to one issue. I agree with Mr. Wilson.

From this exchange it appears that defendants agreed to the issue submitted. Defendants now argue that although they agreed that only one issue need be submitted, they did not agree to the submission of this particular issue. If this is correct, the record fails to show a timely objection to the issue submitted.

"[I]t is within the sound discretion of the trial judge as to what issues shall be submitted to the jury and the form thereof." *Oil Co. v. Fair*, 3 N.C. App. 175, 178-79, 164 S.E. 2d 482, 485 (1968). The judge must submit all issues which are necessary to settle the material controversies arising out of the pleadings. *Id.* at 179, 164 S.E. 2d at 485. Rule 49(c) of the North Carolina Rules of Civil Procedure provides that:

If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so

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omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

It appears from the record that defendants failed to properly object to the issue submitted; even if defendants were found to have properly objected to the forming of the issue, their assignment of error is without merit. The issue presented to the jury, when considered in light of the court's instructions to the jury, settles all the material controversies which arise out of the pleadings. The assignment of error is overruled.

Defendants' next five assignments of error relate to the court's instructions to the jury. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides:

No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. . . .

The record reflects that the defendants failed to properly object to the court's charge. Nevertheless, we have examined the court's instructions and find them fair, complete and free from prejudicial error.

[5] Finally defendants contend that the court erred by denying their motion for a new trial. The granting or denial of a motion for a new trial is within the discretion of the trial judge and is not subject to reversal absent an abuse of discretion. *Coletrane v. Lamb*, 42 N.C. App. 654, 257 S.E. 2d 445 (1979). Defendants base their motion in part on a newspaper article which purports to show that the jury misunderstood or misapplied the law in this case. "It is firmly established in this State that jurors will not be allowed to attack or overthrow their verdicts, nor will evidence from them be received for such purpose." *In re Will of Hall*, 252 N.C. 70, 87-88, 113 S.E. 2d 1, 13 (1960) (quoting *Lumber Co. v. Lumber Co.*, 187 N.C. 417, 418, 121 S.E. 755, 755 (1924)). We find

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no evidence that the court abused its discretion in denying the motion for a new trial. Therefore, the assignment of error is overruled.

No error.

Judges BRASWELL and EAGLES concur.

STATE OF NORTH CAROLINA v. EDITH SUE THOMAS

No. 8321SC81

(Filed 20 December 1983)

1. Criminal Law § 9— aiding and abetting sale and delivery of marijuana—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of felonious sale and delivery of marijuana on the theory that one who aids or abets another in the commission of a crime is guilty as the principal where the evidence tended to show that (1) defendant was present at the scene, (2) she was a friend of the perpetrator who actually sold the marijuana to two undercover police officers, and (3) immediately following the sale of some LSD, she volunteered to the officers in the perpetrator's presence that the perpetrator had some marijuana. Even though defendant may not have explicitly encouraged the perpetrator to sell the marijuana, her conduct was sufficient to support a finding that she aided and abetted in the sale of marijuana to the officer.

2. Criminal Law § 88.3— cross-examination concerning persuasion by officers to accompany them to scene of crime—objection properly sustained

In a prosecution for felonious sale and delivery of marijuana, the trial court properly excluded testimony elicited on cross-examination which tended to show that two undercover officers persuaded defendant to introduce them to someone who could sell them LSD and marijuana rather than stay at home with a little boy since defendant's conviction rested on evidence of her conduct while present at the scene of the transaction and testimony concerning how defendant came to be at the scene was simply not relevant.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 14 October 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 September 1983.

On 16 August 1982, defendant was charged in separate indictments with three counts of felonious sale and delivery of a con-

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trolled substance. Two counts involved the alleged sale and delivery of marijuana on 24 February 1982 and again on 15 April 1982. The remaining count involved the alleged sale and delivery of LSD on 15 April 1982. At her arraignment, defendant pleaded not guilty to all charges. On 14 October 1982, the District Attorney dismissed the charges alleging sale and delivery of marijuana on 24 February 1982. Defendant was tried before a jury on the remaining two charges.

The State's evidence tended to show the following:

Defendant's arrest occurred in connection with an undercover investigation by officers Hall and Wiggins of the Stokes County and Forsyth County Sheriff's Departments. The officers, working undercover, first met defendant in March of 1982. Without disclosing that they were law enforcement officers, they asked for and received defendant's help in locating individuals from whom they could purchase drugs.

On 15 April 1982, the undercover officers asked defendant to go with them for the purpose of introducing them to one Jim Dearman, an acquaintance of defendant's, so that the officers could purchase some LSD from him. Defendant accompanied the officers to a house where they met Dearman. Defendant told Dearman that the officers wanted to purchase some LSD. Dearman sold the LSD to the officers. Defendant then told the officers that Dearman also had some marijuana. The officers indicated to Dearman that they wanted to buy some marijuana as well. Dearman sold the marijuana to the officers.

The officers took defendant back home and did not see her again until she was arrested on 25 June 1982. The substances purchased from Dearman were analyzed and found to be LSD and marijuana.

At the close of the State's evidence, defendant's motion to dismiss the charges on the grounds that the evidence was insufficient was denied.

Defendant presented no evidence and renewed her motion to dismiss, which was again denied. The jury returned verdicts of not guilty as to felonious sale and delivery of LSD but guilty of felonious sale and delivery of marijuana. Defendant was sen-

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tenced to two years imprisonment. From judgment entered on the verdict, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Davis and Harwell, by Fred R. Harwell, for defendant appellant.

EAGLES, Judge.

[1] Defendant excepts to and assigns as error the denial by the trial court of her motion to dismiss the charges against her. Defendant was found not guilty of felonious sale and delivery of LSD. Denial of the motion with respect to the charge of felonious sale and delivery of marijuana is the issue now before the court. Defendant contends that the State's evidence was insufficient to sustain her conviction and that the charge should therefore not have been submitted to the jury.

It is clear from the briefs and the record that defendant was tried on the theory that one who aids or abets another in the commission of a crime is guilty as a principal. *E.g., State v. Walden*, 306 N.C. 466, 293 S.E. 2d 780 (1982) (child abuse); *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970) (murder; accessory before the fact); *see generally* 4 N.C. Index 3d, Criminal Law § 9.2 (1976). With respect to this theory, defendant contends that the evidence of her conduct during the transaction in question was insufficient to support a finding that she aided or abetted Dearman in the sale of marijuana to officers Wiggins and Hall and that her motion to dismiss should have been granted. We disagree.

In a motion to dismiss, the question presented is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). In order to withstand a motion to dismiss, the State's evidence as to each element of the offense charged must be substantial. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981); *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). Substantial evidence in this context means more than a scintilla. *Id.*; *see State v. Weinstein*, 224 N.C. 645, 31 S.E. 2d 920, 156 A.L.R. 625 (1944) *cert. denied sub nom. Weinstein v. State*, 324 U.S. 849 (1945) (same test in motion

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for nonsuit). The evidence, considered in the light most favorable to the State and indulging every inference in favor of the State, must be such that a jury could reasonably find the essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, *reh. denied*, 444 U.S. 890 (1979); *State v. Jones*, 303 N.C. 500, 279 S.E. 2d 835 (1981).

Here, there is no question that a sale of marijuana from Dearman to the officers took place on 15 April 1982 and that defendant was present at the scene. In order to support a conviction on a theory of aiding or abetting, there must be substantial evidence that defendant's conduct amounted to more than mere presence at the scene. *State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967). The defendant must also have the intent to aid or abet. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975), *cert. denied sub nom. Sanders v. North Carolina*, 423 U.S. 1091 (1976). However, presence at the scene need be accompanied only by circumstantial evidence in order to permit the inference that a person aided and abetted the commission of the offense. "The communication or intent to aid, if needed, does not have to be shown by express words of the defendant, but may be inferred from his actions and his relation to the actual perpetrators." *Id.* at 291, 218 S.E. 2d at 357. In some circumstances, presence alone may be sufficient to permit the inference that the defendant aided or abetted. *E.g.*, *State v. Walden*, *State v. Sanders*, both *supra*; *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Williams*, 225 N.C. 182, 33 S.E. 2d 880 (1945).

In this case, the evidence shows (1) that defendant was present at the scene, (2) that she was a friend of the perpetrator, and (3) that, immediately following the sale of LSD, she volunteered to the officers in Dearman's presence that Dearman had some marijuana. Even though defendant may not have explicitly encouraged Dearman to sell the marijuana, her conduct is clearly sufficient to support a finding that she aided and abetted in the sale of marijuana to the officers.

In further support of her first assignment of error, defendant contends that the evidence is insufficient to support the finding that a sale and delivery of a controlled substance actually occurred. Defendant points out that no marijuana was offered as evidence by the State and that there was no proof that the sub-

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stance found by the laboratory to be marijuana was the same substance sold by Dearman to the officers. This contention is without merit. In order to support a conviction for sale and delivery of a controlled substance, the State needs only to establish that a controlled substance was transferred. *State v. Salem*, 50 N.C. App. 419, 274 S.E. 2d 501 (1981), *disc. rev. denied*, 302 N.C. 401, 279 S.E. 2d 355 (1981). Here, the State's evidence shows all that is necessary to establish the transaction between Dearman and the officers. Any weaknesses or doubts inferable from the failure to produce the marijuana in court are to be raised on cross-examination. Defendant's first assignment of error is overruled.

[2] In her second assignment of error, defendant contends that the trial court erroneously sustained objections to certain questions posed by her attorney in his cross-examination of Officer Wiggins. Defendant's assignment is based on the following exchange:

MR. HARWELL [Defendant's attorney]: Couldn't you have left Edith Thomas at home that day?

OFFICER WIGGINS: No sir, I could not.

MR. HARWELL: You were compelled to take Edith Thomas with you on the fifteenth of April over to James Dearman's—

MR. WALKER: Objection.

THE COURT: Sustained.

MR. HARWELL: Why couldn't you leave her at home?

OFFICER WIGGINS: She made the statement she couldn't go unless this kid went with us.

MR. HARWELL: Why didn't you leave her and the child at home?

OFFICER WIGGINS: We needed her to introduce us back into James Dearman.

MR. HARWELL: So, it was more important for you to get that introduction that it was to think about the safety of that little boy?

MR. WALKER: Objection.

THE COURT: Sustained.

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Defendant argues that the excluded testimony was relevant to her defense because it tended to show that she would not have been present at the scene of the crime without having been persuaded by the officers to accompany them. This contention is without merit.

The question before the trial court was whether defendant aided or abetted in the sale of marijuana to Officers Wiggins and Hall on 15 April 1982. Defendant's conviction rests on evidence of her *conduct while present at the scene of the transaction*. Testimony concerning how defendant came to be at the scene is simply not relevant; she was always free not to engage in the conduct that led to her conviction. Defendant has failed to show how the excluded testimony bears any logical relation to the issue before the trial court or how its exclusion was prejudicial to her defense. We hold that the trial court's evidentiary rulings on this question were correct and that the testimony was properly excluded. *See State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980) (testimony in a rape case that an intersection was busy and victim could have screamed for help held not relevant where not related to the time of the offense). *See generally* Brandis N.C. Evidence § 77 (1982). Defendant's second assignment of error is therefore overruled. In the trial of this defendant we find

No error.

Judges ARNOLD and WELLS concur.

NEW HANOVER COUNTY v. JOSEPH BURTON AND BURTON STEEL COMPANY

No. 825SC1100

(Filed 20 December 1983)

1. Appeal and Error § 6— appeal by prevailing party

The prevailing party may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be.

2. Municipal Corporations § 30.19— zoning—change in nonconforming use—discontinuance of use—right to resume nonconforming use

Defendants' change of the nonconforming use of their property without proper approval as required by a county zoning ordinance constituted a discon-

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tinuance of the proper nonconforming use, but under the ordinance, defendants were entitled to resume their nonconforming use as it existed prior to the effective date of the ordinance in the absence of a finding that there was a discontinuance of such nonconforming use for a consecutive period of two years.

APPEAL by plaintiff from *Rouse, Judge*. Judgment entered 21 June 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 2 September 1983.

This civil action was brought by plaintiff New Hanover County (hereinafter "the county") to prohibit defendants from engaging in activities on defendant Burton's property which constituted a nonconforming use of that property under the county zoning ordinance.

Since 1970, defendants have operated a metal fabricating business on the property that is the subject of this appeal. On 14 July 1974, the county zoning ordinance became effective. Defendants' property was subject to the ordinance, and their metal fabricating business became a nonconforming use. The ordinance allowed for the continuance of pre-existing nonconforming uses. While remaining a metal fabrication business, the nature of defendants' activity changed to the extent that in May of 1979, defendants were found by the county building inspector to be in violation of various provisions of the ordinance by reason, *inter alia*, of defendants' change and extension of their original nonconforming use to a different kind of nonconforming activity. Defendants appealed this decision to the New Hanover County Zoning Board of Adjustment where it was affirmed. The Board of Adjustment's decision was affirmed by New Hanover Superior Court which in turn was affirmed by this Court.

On 5 December 1980, plaintiff initiated the present proceeding by filing a complaint in Superior Court seeking preliminary and permanent injunctions and an order of abatement enforcing the zoning ordinance and requiring defendants to cease their then existing nonconforming activity and return the property only to conforming uses. A preliminary injunction was granted which became effective on 10 March 1981 after the denial by our Supreme Court of defendants' petition for discretionary review of the decision of this Court. *Burton v. Zoning Board of Adjustment*, 49 N.C. App. 439, 271 S.E. 2d 550 (1980), *cert. denied* 302 N.C. 217, 276 S.E. 2d 914 (1981).

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In their answer, defendants denied the material allegations of the complaint and asserted various equitable defenses. In an amendment to their answer, defendants alleged that under the relevant provisions of the zoning ordinance (Sections 45-2 and 46-1), they were entitled to continue their nonconforming activity as it existed prior to the effective date of the zoning ordinance, provided that they had not abandoned or discontinued the original nonconforming use for a period of two years.

Plaintiff's motion for summary judgment, G.S. 1A-1, Rule 56, was denied on the grounds that a question of material fact existed as to whether or not there had been a discontinuance of the original nonconforming use for a period of two years. The order on final pretrial conference contains various stipulations as to the undisputed facts, including the fact of defendants' violation of Sections 44-1, 44-2, 44-3, 44-4 and 44-5 of the New Hanover County Zoning Ordinance; defendants' failure to seek or obtain approval by the New Hanover County Zoning Board of Adjustment for their change from one nonconforming use to another nonconforming use; and the fact that the "defendants' changed or different nonconforming use of the property has been continuous since the date of change."

The matter came to trial before a jury at the 17 May 1982 Session of Superior Court. At the conclusion of all the evidence, plaintiff moved for a directed verdict pursuant to G.S. 1A-1, Rule 50, on the grounds that no issue of material fact had been presented by the evidence, all of the facts being judicially admitted, stipulated, or not in controversy, and that the plaintiff was entitled to judgment as a matter of law.

The court allowed plaintiff's motion and made the following factual findings:

There were no findings by the New Hanover County Zoning Board of Adjustment that there was a discontinuance of a nonconforming use for a consecutive period of two years. See Sections 45 and 46 of the Zoning Ordinance of New Hanover County.

In the absence of such a finding the defendants in this action are entitled to continue the nonconforming use of the property in question as it existed prior to July 14, 1974, the effective date of the Zoning Ordinance.

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On the basis of the facts found, the court entered an injunction requiring defendants to cease operating their business in its then-present nonconforming form. However, the court did not require defendants to use the property only for conforming uses in the future as plaintiffs sought, but rather, concluded that defendants could continue to engage in their original nonconforming use as that use existed prior to the effective date of the ordinance. The court directed defendants to remove any structures that were not consistent with the pre-existing nonconforming use of the property. Plaintiff appealed from this judgment.

Murchison, Newton, Taylor & Shell, by Joseph O. Taylor, and County Attorney Robert W. Pope, for plaintiff appellant.

Robert White Johnson, for defendant appellees.

JOHNSON, Judge.

[1] We note at the outset that the plaintiff county is appealing from a judgment rendered in its favor. By its appeal, the county requests that this Court "reverse the trial court and strike all of the trial judge's order filed June 21, 1982, except those portions which grant plaintiff's motion for a directed verdict." In the alternative, the county requests that the trial judge be reversed and summary judgment be entered in its favor. We take it that by this appeal the county seeks modification of the judgment to grant the full relief requested in its complaint, that is, an injunction prohibiting defendants from engaging in *any* activities on the property which do not constitute conforming uses under the New Hanover County Zoning Ordinance. This plaintiff may do, since the prevailing party may appeal from a judgment that is only partly in its favor, or is less favorable than the party thinks it should be. *McCulloch v. Railroad*, 146 N.C. 316, 59 S.E. 882 (1907).

[2] The issues raised by this appeal involve the trial court's construction of the relevant provisions of the zoning ordinance, Sections 45-2 and 46-1, and their application to the facts of this case. Specifically, whether the court correctly concluded that in the absence of a finding of a discontinuance of a nonconforming use for a consecutive period of two years, there was no termination of the right to continue a nonconforming use, and therefore the landowner was entitled to continue the nonconforming use as it existed prior to the effective date of the zoning ordinance.

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Plaintiff's primary argument is that the trial judge incorrectly concluded that the relief allegedly sought by plaintiff—complete and permanent cessation of all nonconforming uses of defendants' property—required a finding by the Zoning Board of Adjustment that defendants' pre-existing nonconforming use had been discontinued for two years. Specifically, plaintiff contends that defendants' established violation of the zoning ordinance constitutes a discontinuance of the pre-existing nonconforming use of the property such that, under the applicable provisions of the zoning ordinance, defendants are subsequently prohibited from engaging in any nonconforming use of the property without the prior approval of the appropriate authorities.

The applicable provisions of the New Hanover County Zoning Ordinance are as follows:

45-2 A non-conforming use may be changed to another non-conforming use only in accordance with approval issued by the Board of Adjustment. The Board shall issue such approval if it finds that the proposed use will be more compatible with the surrounding neighborhood than the use in operation at the time the approval is applied for. If a non-conforming use is changed to any use other than a conforming use without obtaining approval pursuant to this paragraph, that change shall constitute a discontinuance of the non-conforming use, with consequences as stated in Section 46.

46-1 When a non-conforming use is discontinued for a consecutive period of two (2) years, the property involved may thereafter be used only for conforming purposes.

Defendants were found to be in violation of the zoning ordinance. That finding was appealed without success through the proper administrative and judicial channels and was ultimately affirmed by this Court, with the Supreme Court refusing discretionary review. Under the ordinance, defendants' violation constituted a discontinuance of the pre-existing nonconforming use. Plaintiff contends that a discontinuance of this type has the effect of immediately terminating the defendants' right to engage in any nonconforming use of the property, regardless of whether it was a pre-existing use, without the prior approval of the proper authorities.

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However, the same provision of the ordinance that characterizes defendants' violation as a discontinuance also brings on the further consequence, set out in Section 46-1 of the ordinance, of prospectively restricting the property to conforming uses only in the event the discontinuance of the pre-existing nonconforming use lasts for a period of two consecutive years. In the judgment, the court found that there was "no issue of fact raised by the evidence" and that the Zoning Board had made no findings that there was a discontinuance of a nonconforming use for a period of two years. The county does not even contend that it offered evidence tending to show that the alleged discontinuance lasted for two consecutive years. The county did not choose to include the evidence at trial in the record on appeal. Where the evidence is not set out in the record, a nonsuit or directed verdict will be presumed correct. *See Reams v. Hight*, 201 N.C. 797, 161 S.E. 484 (1931). Furthermore, we perceive no possible construction of the zoning ordinance which supports plaintiff's contention, either directly or inferentially.¹ Nor can we perceive a result from the application of the above-quoted provisions to the present factual context other than that reached by the trial judge in this case.

In conclusion, we note that our holding is consistent with the majority of other jurisdictions that have ruled on similar questions. *See generally* Anderson, American Law of Zoning 2d, §§ 33-6.63 (1976). The two cases cited by plaintiff in support of its position, *State v. Miller*, 206 Min. 345, 288 N.W. 713 (1939) and

1. However, we note a troubling ambiguity in the ordinance itself. Under Section 45-2, a change in nonconforming uses without prior approval constitutes a discontinuance of the nonconforming use "with consequences as stated in Section 46" (emphasis added). Read narrowly, as the County would have us do, "consequences" refers to the penalty imposed in Section 46-1—the use of the property thereafter only for conforming purposes. Read broadly, "consequences" includes the condition precedent in Section 46-1, a two-year waiting period. The title and provisions of Section 46, *Abandonment and Discontinuance of Non-Conforming Situations*, suggest an abandonment and discontinuance under ordinary circumstances. Section 45-2, on the other hand, is a penalty provision. The County argues that a violation of Section 45-2, a change in nonconforming uses without prior approval, brings about the same result as in an ordinary abandonment—a forfeiture, without the two-year waiting period. However, zoning ordinances are in derogation of private property rights, and such ambiguities should be construed in favor of freedom of use. *In re Application of Construction Co.*, 272 N.C. 715, 158 S.E. 2d 887 (1968).

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Barbarisi v. Board of Adjustment, 30 N.J. Super. 11, 103 A. 2d 164 (1954), are arguably on point but are more consistent with our reading of the law than with that urged by plaintiff. We see no need to discuss those cases here.

In view of our finding that the trial judge correctly applied the law with respect to the legal effect of defendants' violation, it follows that defendants are entitled to resume their nonconforming use as it existed prior to the effective date of the zoning ordinance. The county's contention to the contrary is without merit.

Our disposition of the central issue on appeal renders review of plaintiff's other assignments of error unnecessary. Under the facts found and the applicable law, the plaintiffs have received all of the relief to which they are entitled.

The judgment appealed from is

Affirmed.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA *EX REL.* ALAN C. LEONARD, DISTRICT ATTORNEY FOR THE TWENTY-NINTH JUDICIAL DISTRICT *v.* DAMON H. HUSKEY, SHERIFF OF RUTHERFORD COUNTY

No. 8329SC967

(Filed 20 December 1983)

Appeal and Error § 6.2; Public Officers § 12; Rules of Civil Procedure § 1; Sheriffs § 1 — action to remove sheriff—rules of civil and criminal procedure not applicable — appealability of interlocutory order

In an action brought by the State seeking to remove defendant sheriff from office pursuant to G.S. §§ 128-16 to -20, the State had a substantial interest in the speedy resolution of the removal proceedings against the sheriff and could appeal from an order granting defendant's motion for a 120 day discovery period, even though it was interlocutory, since it threatened to delay the trial significantly. The action to remove a sheriff from office is neither civil nor criminal, but is merely an inquiry into the conduct of the officeholder to determine whether he is unfit to continue in office; therefore, the Rules of Civil Procedure and the Rules of Criminal Procedure do not apply.

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APPEAL by petitioner-relator from *Grist, Judge*. Order entered 4 August 1983 in RUTHERFORD County Superior Court. Heard in the Court of Appeals 2 December 1983.

Petitioner brought this action seeking to remove defendant from office pursuant to G.S. §§ 128-16 to -20. The petition alleged numerous instances of misconduct and abuse of office. Defendant quickly served notices of deposition upon potential witnesses. He also made a motion requesting 120 days for discovery before the case would be calendared for trial. Petitioner opposed this motion and additionally moved to quash the notices of deposition on the grounds that the Rules of Civil Procedure, G.S. § 1A-1, did not apply to the case. The trial court granted defendant's motion for a 120 day discovery period, ruling that the Rules of Civil Procedure apply to this action. Petitioner's motion was denied. Petitioner appealed.

District Attorney Alan C. Leonard and Assistant District Attorney Jefferson C. McConnaughey, for petitioner.

T. Eugene Mitchell, J. Nat Hamrick, Sr., and George R. Morrow, for defendant.

WELLS, Judge.

Before turning to the merits of this appeal, we first consider whether petitioner's appeal should be dismissed as interlocutory.

"Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." (Citations omitted.) *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975). An appeal from a pretrial discovery order is clearly interlocutory and therefore must be dismissed unless it affects some substantial right of the public, on whose behalf the removal action is brought.

A review of cases from North Carolina reveals no consistent rule regarding interlocutory appeals of discovery orders. Comment, *Interlocutory Appeals in North Carolina: The Substantial Right Doctrine*, 18 Wake Forest L. Rev. 857 (1982). The reported cases tend to focus upon the importance of obtaining the requested information, rather than the delaying effect such an order might have upon conclusion of the litigation. See, e.g., *Tennessee-*

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Carolina Transportation, Inc. v. Strick Corporation, 291 N.C. 618, 231 S.E. 2d 597 (1977) (appeal permissible from order barring defendant from taking deposition of out-of-state expert witness since denial would significantly damage defendant's case); *Dworsky v. The Travelers Insurance Company*, 49 N.C. App. 446, 271 S.E. 2d 522 (1980) (appeal impermissible from denial of plaintiff's motion to compel production of file since no showing of information vital to case).

In the case before us, the removal statute provides that the proceeding ". . . shall . . . take precedence over all other causes upon the court calendar, and shall be heard at the next session after the petition is filed. . . ." G.S. § 128-20. The clear purpose of the provision is to ensure that charges of misconduct will be resolved as quickly as possible, minimizing the risk of loss of public confidence in law enforcement. We hold, therefore, that the State has a substantial interest in speedy resolution of removal proceedings against law enforcement officers, and may appeal from any order which threatens to delay the trial significantly.

The question brought forward by petitioner is whether the provisions of G.S. § 1A-1, Rules of Civil Procedure, apply to actions brought pursuant to the provisions of G.S. §§ 128-16 through -20. We hold that the Rules of Civil Procedure do not apply to such actions and remand for further proceedings consistent with this opinion.

The statute under which petitioner seeks to remove respondent from office is as follows:

§ 128-16. *Officers subject to removal; for what offenses.*

Any sheriff or police officer shall be removed from office by the judge of the superior court, resident in or holding the courts of the district where said officer is resident upon charges made in writing, and hearing thereunder, for the following causes:

- (1) For willful or habitual neglect or refusal to perform the duties of his office.
- (2) For willful misconduct or maladministration in office.
- (3) For corruption.

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(4) For extortion.

(5) Upon conviction of a felony.

(6) For intoxication, or upon conviction of being intoxicated.

§ 128-17. *Petition for removal; county attorney to prosecute.*

The complaint or petition shall be entitled in the name of the State of North Carolina, and may be filed upon the relation of any five qualified electors of the county in which the person charged is an officer, upon the approval of the county attorney of such county, or the district attorney of the district, or by any such officer upon his own motion. It shall be the duty of the county attorney or district attorney to appear and prosecute this proceeding.

§ 128-18. *Petition filed with clerk; what it shall contain; answer.*

The accused shall be named as defendant, and the petition shall be signed by some elector, or by such officer. The petition shall state the charges against the accused, and may be amended, and shall be filed in the office of the clerk of the superior court of the county in which the person charged is an officer. The accused may at any time prior to the time fixed for hearing file in the office of the clerk of the superior court his answer, which shall be verified.

§ 128-19. *Suspension pending hearing; how vacancy filled.*

Upon the filing of the petition in the office of the clerk of the superior court, and the presentation of the same to the judge, the judge may suspend the accused from office if in his judgment sufficient cause appear from the petition and affidavit, or affidavits, which may be presented in support of the charges contained therein. In case of suspension, as herein provided, the temporary vacancy shall be filled in the manner provided by law for filling of the vacancies in such office.

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§ 128-20. *Precedence on calendar; costs.*

In the trial of the cause in the superior court the cause shall be advanced and take precedence over all other causes upon the court calendar, and shall be heard at the next session after the petition is filed, provided the proceedings are filed in said court in time for said action to be heard. The superior court shall fix the time of hearing. If the final termination of such proceedings be favorable to any accused officer, said officer shall be allowed the reasonable and necessary expense, including a reasonable attorney fee, to be fixed by the judge, he has incurred in making his defense, by the county, if he be a county officer, or by the city or town in which he holds office, if he be a city officer. If the action is instituted upon the complaint of citizens as herein provided, and it appears to the court that there was no reasonable cause for filing the complaint, the costs may be taxed against the complaining parties.

Although our courts have previously viewed actions brought under the statute as being in the nature of civil actions, see *State v. Hockaday*, 265 N.C. 688, 144 S.E. 2d 867 (1965) and *State ex rel. Hyatt v. Hamme*, 180 N.C. 684, 104 S.E. 174 (1920), both the Rules of Civil Procedure and the Rules of Criminal Procedure, see Chapter 15A of the General Statutes, have been adopted since *Hamme* and *Hockaday* were decided. Since this action does not fall within either Chapter 1A-1 or Chapter 15A, we hold that such actions are neither civil nor criminal, but are merely an inquiry into the conduct of the officeholder to determine whether he is unfit to continue in office. See *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977). Notwithstanding, because of the severe adverse consequences possible for the officeholder under such an action, fundamental fairness entitles the officeholder to a hearing which meets the basic requirements of due process, *Nowell*, *supra*, requirements which must include adequate time and opportunity to prepare to respond to the accusations against him.

Although the statute requires a prompt trial, its terms are broad enough to allow the trial court to set the time of trial within his discretion, considering, among other things, the nature of the charges brought and the terms of court available for trial. Within the context of fundamental fairness in setting the time for

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hearings in such actions, we cannot overlook the fact that in a metropolitan county such as Mecklenburg, where superior court is almost constantly in session, an accused officer would face a radically different hearing time problem than in a rural county such as Clay where normally there are only two sessions of superior court per year.

Because the order appealed from was expressly grounded on the misapprehension that the Rules of Civil Procedure apply and we have here held that they do not, the order is vacated. Upon remand the trial court, in setting the time for trial, may in its discretion allow a continuance and may allow defendant such discovery as the trial court deems necessary for a fair hearing.

Vacated and remanded.

Judges WEBB and WHICHARD concur.

RUFUS K. HAYWORTH AND WIFE, DOROTHY HAYWORTH v. BROOKS
LUMBER CO. AND FRANCIS A. BROOKS, III

No. 8218SC1350

(Filed 20 December 1983)

1. Contracts § 29.1— construction contract—failure to correct defects—measure of damages

Where defendant agreed in a construction contract to furnish any materials and labor needed to correct any defects or faulty operations resulting from its work at no cost to plaintiff owners, the proper measure of damages for defects in the construction was the cost of repairs needed to make the work conform to the contract.

2. Contracts § 29.1— breach of construction contract—failure to make repairs—award by trial court—proper measure of damages

The trial judge's award for defendant contractor's failure to repair defective work was based upon the proper measure of the cost of repairs rather than on evidence of the difference in the fair market value of the property, and the award was neither speculative nor excessive where it was based on the cost of those repairs itemized by a contractor employed by the owners to correct work and finish defendant's work.

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3. Contracts § 27.2—breach of construction contract—failure to repair defective work—entitlement to damages

The evidence was sufficient to support the trial court's determination that defendant failed to make repairs to plaintiffs' house in a suitable and workmanlike manner and that plaintiffs suffered damages caused by the defective workmanship.

APPEAL by defendant Brooks Lumber Company from *Washington, Judge*. Judgment entered 13 September 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 November 1983.

On 15 April 1977 plaintiffs' house was extensively damaged by fire. Defendant was employed to repair all damage at a cost of \$31,267.40, and agreed to restore the house to its condition prior to the fire. Soon after the fire, defendant replaced the roof, ceilings in three rooms, screen wire on the back porch and necessary plumbing and wiring. Defendant also repaired interior walls and painted both the exterior and interior of the house. Upon completion of this work, defendant requested payment. Plaintiffs turned over the \$31,267.40 only after defendant signed a document dated 9 September 1977 and entitled "RELEASE AND AGREEMENT." Two of the terms of this agreement were as follows:

3. That all materials used and all labor performed, whether by BROOKS LUMBER COMPANY or any subcontractor, is guaranteed to be free of defects and BROOKS LUMBER COMPANY hereby agrees to furnish any materials and labor necessary or needed to correct any defects or faulty operations that result from the work and repairs performed by said BROOKS LUMBER COMPANY, and BROOKS LUMBER COMPANY agrees to do this at no additional cost to Rufus and Dorothy Hayworth or their heirs or assigns.

. . . .

5. To properly repair defects that are now obvious such as: walls in the utility room, one upstairs light fixture, some kitchen cabinet doors that are stained and warped, back porch screen wire that is sagging, bathroom light fixtures, and to treat certain areas that still have a smoke odor, and to do this at no additional cost to Rufus and Dorothy Hayworth or their heirs or assigns.

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Within four to six months after this agreement was signed, paint was peeling off the exterior trim and cracks had appeared in the walls and ceilings. Sometime during 1978 plaintiffs wrote defendant's president and informed him of these problems. Plaintiffs further indicated that the gutters were not catching water; that the roof was leaking and that some of the molding around the ceiling had dropped.

On 17 April 1981 plaintiffs filed a complaint against defendant alleging that defendant had failed to repair the defects listed in the RELEASE AND AGREEMENT and in plaintiffs' 1978 letter. Plaintiffs alleged that they were entitled to both actual and punitive damages in the amount of \$25,000 each.

The matter was heard before Judge Washington, sitting without a jury. Defendant appeals from the judgment awarding plaintiffs \$5,975 in damages.

Luke Wright for plaintiff appellees.

Osteen, Adams, Tilley & Walker, by J. Patrick Adams, for defendant appellant.

ARNOLD, Judge.

On appeal defendant assigns error to the measure of damages employed by the trial court and the sufficiency of evidence to support the finding of fact and conclusion of law regarding defendant's failure to make repairs in a suitable and workmanlike manner.

During the trial plaintiff Rufus Hayworth testified, over defendant's objection, that the fair market value of his house before the fire was \$110,000 and that the house was worth only \$80,000 after defendant made repairs. Plaintiff further presented evidence that in June 1982 he employed a contractor to make repairs that were necessary to remedy defects in defendant's work. The contractor testified that the cost of these repairs was \$6,375. This cost was broken down as follows: \$1,600 for exterior painting, \$1,000 for interior painting, \$252 for repairing cracks in walls and ceilings, \$250 for repairing the gable above the front porch and \$3,000 for replacing the windows. There was testimony that 17 of the 23 windows had been replaced with more expensive double-paned windows.

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[1] Defendant argues that the trial judge improperly considered the difference in market value of the house, and that the costs of repairs were too excessive and speculative. We disagree.

The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its equivalent. What the equivalent is depends upon the circumstances of the case. In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value. (Citations omitted.)

Robbins v. Trading Post, Inc., 251 N.C. 663, 666, 111 S.E. 2d 884, 887 (1960). If a construction contract provides that the contractor will repair, replace or adjust defects in materials or workmanship at no cost to the buyer then the measure of damages for such defects is limited to the cost of making the work conform to the contract. *Leggette v. Pittman*, 268 N.C. 292, 150 S.E. 2d 420 (1966). Since the defendant in the case on appeal expressly agreed to furnish any materials and labor needed to correct any defects or faulty operations resulting from its work at no cost to plaintiffs, the proper measure of damages was the cost of repairs.

[2] The judgment dictated by the trial judge at the close of trial and included in the transcript filed pursuant to App. R. 9(c)(1), contains language which was later omitted from the judgment signed by the judge. Examination of this omitted language leads us to the conclusion that the judge's award was based upon evidence of the cost of repairs needed to make the work conform to the parties' agreement.

In his dictated findings, the trial judge noted the evidence regarding the difference in the fair market value of the house

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before the fire and after defendant made repairs. He indicated that this evidence would be considered "as it bore upon the question of damages." The trial judge later found:

that the passage of time without prompt remedial work has contributed to some extent to the damages of the Plaintiffs, and the Plaintiffs having made repeated demands upon the Defendant for the performance of such work, are entitled to recover the *reasonable value of such repair work*. (Emphasis supplied.) That such value cannot include the total repair bill incurred by the plaintiffs at this time.

The trial judge concluded:

that the Plaintiffs have suffered damages by the failure of the Defendant to perform this repair work or to remedy it, and that the reasonable value of such damages at this time, taking into consideration the lapse of time from September 9, 1977, the possibility of other causation, and the lack of positive evidence as to some repair work occasioned and cost, the damages being the sum of \$5,975, based upon the contract between the parties and the damages caused to the Plaintiffs.

The award of \$5,975 is clearly more in line with the figure given for the cost of repairs necessary to correct defendant's defective repairs (\$6,375), than the difference in fair market value of the house before the fire and after defendant made repairs (\$30,000).

We also find that the award was neither speculative nor excessive. The trial judge pointed out that there was no evidence regarding some of the alleged defects; and that the windows were replaced with more expensive windows. We believe, however, that the \$5,795 award properly reflects the cost of those repairs itemized by the contractor employed by plaintiffs to correct work and finish defendant's work, and takes into consideration the replacement of windows with ones more expensive.

[3] In defendant's next assignment of error, it argues that there was insufficient evidence to support the finding of fact and conclusion of law that defendant failed to make repairs in a suitable and workmanlike manner. We initially note that defendant failed to set out any exceptions to findings of fact or conclusions of law in the body of the record. Pursuant to App. R. 10(a), the scope of

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review is therefore limited to whether the judgment is supported by the findings of fact and conclusions of law. *See Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E. 2d 902 (1980).

The trial judge found that in the 9 September 1977 RELEASE AND AGREEMENT, certain defects in defendant's repairs were listed and defendant expressly agreed to correct these defects. The trial judge further found:

6. That the president of the corporate defendant suggested to the plaintiffs that there be some delay in making the repairs set out in the agreement, inasmuch as it was anticipated that other repairs would have to be made, and the corporate defendant would like to make all those repairs at one time; that within four to six months after September 9, 1977, other defects appeared, such as the peeling of the paint on the rake boards and windows on the outside, and cracks appeared in the walls and ceilings; that the plaintiffs pointed out those defects, as well as other defects, to the corporate defendant, through its president, by making numerous telephone calls and certified letters, with return receipts being requested, that by an undated letter written during the year 1978 to the corporate defendant, the male plaintiff listed the defects such as the condition of the paint, the guttering, the cracks in the ceiling and the walls, the condition of the laundry room, the condition of the molding and other defective conditions; that the corporate defendant went back to the plaintiffs' property on two occasions to do remedial work, and on one of those occasions the feme plaintiff did not want the work done at that time because of certain health problems the male plaintiff was having;

The judge concluded that defendant failed to correct these defects. The foregoing findings of fact and erroneously labelled conclusion of law support the conclusion that plaintiffs suffered damages caused by defective workmanship.

For the reasons stated above the judgment in plaintiffs' favor is

Affirmed.

Judges HILL and BRASWELL concur.

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FMS MANAGEMENT SYSTEMS, INC. v. E. H. THOMAS AND JESSE M. WALLER

No. 8226SC1285

(Filed 20 December 1983)

Judgments § 51— action to enforce Florida deficiency judgment in North Carolina— full faith and credit

Although plaintiff, under G.S. 45-21.38, could not have enforced a deficiency judgment in a purchase money transaction in North Carolina if the foreclosure on the security yielded an insufficient amount to satisfy the indebtedness, pursuant to the Full Faith and Credit Clause, the trial court properly granted plaintiff's motion for judgment on the pleadings in an action on a Florida deficiency judgment.

Judge WELLS dissenting.

APPEAL by defendants from *Johnson and Snepp, Judges*. Judgments entered 16 April and 8 September 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 October 1983.

Defendants appeal from orders denying defendants' motions for judgment on the pleadings and summary judgment and granting plaintiff's motion for judgment on the pleadings in an action on a Florida deficiency judgment.

The pertinent facts are:

On or about 27 June 1973, defendants, E. H. Thomas and Jesse M. Waller, partners of Thomas and Waller, a North Carolina general partnership, purchased two approximately ten-acre parcels of land in Seminole County, Florida, from plaintiff's predecessor in interest, a Florida corporation. Defendants, in return, executed and delivered to plaintiff's predecessor a purchase money mortgage note for \$605,200.00. After paying \$368,921.02 on the note, defendants defaulted.

On 1 April 1976, plaintiff was awarded a final judgment of foreclosure in a Florida court. After foreclosure, plaintiff instituted action in a Florida court for a deficiency judgment. The Florida court found a legal deficiency of \$267,985.43. After considering equitable matters, the Court reduced this amount, and on 28 October 1976, granted plaintiff judgment of \$41,146.47 to cover

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interest, attorney fees, court costs and the cost to redeem tax certificates.

On 12 November 1981, said judgment not having been paid, plaintiff, a Maryland corporation, authorized to conduct business in Florida, instituted action on the judgment against defendants, North Carolina residents, in North Carolina.

On 16 April 1982, the Court denied defendants' motion for judgment on the pleadings. On 8 September 1982, the Court denied defendants' motion for summary judgment and granted plaintiff's motion for judgment on the pleadings. Plaintiff was awarded \$76,692.54 plus court costs of \$45 and interest thereon from 8 September 1982.

Young, Moore, Henderson and Alvis, P.A., by Edward B. Clark and B. T. Henderson, II, for plaintiff appellee.

Parker Whedon, for defendant appellants.

VAUGHN, Chief Judge.

Defendants contend that the trial court erred in denying their motions for judgment on the pleadings and summary judgment and granting plaintiff's motion for judgment on the pleadings since the subject of the Florida judgment is against the policy of and could not have been entertained in a North Carolina court. We find no merit in defendants' contention.

Under G.S. 45-21.38, which abolishes deficiency judgments in purchase money transactions if foreclosure on the security yields an insufficient amount to satisfy the indebtedness, plaintiff could not have instituted action for the deficiency in North Carolina. The question in this case, however, concerns not the validity of a North Carolina deficiency judgment, but the validity in North Carolina of a Florida deficiency judgment, valid under Florida law. *See Fla. Stat. § 702.06.*

In this situation we are faced squarely with the Full Faith and Credit Clause, which mandates that each state give full faith and credit to the public acts, records, and judicial proceedings in every other state. U.S. Const. Art. IV, § 1. A litigation, once pursued to a judgment, is conclusive, under this constitutional mandate, of the rights of the parties in every other court as in that

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where judgment was rendered. *Morris v. Jones*, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488, 168 A.L.R. 656, *reh. denied*, 330 U.S. 854, 67 S.Ct. 858, 91 L.Ed. 1296 (1947).

Defendants contend that the Florida judgment is not entitled to full faith and credit since it violates the public policy of our state. Defendants' contention lacks merit.

In *Fauntleroy v. Lum*, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed. 1039 (1908), a Mississippi court refused to accord full faith and credit to a Missouri judgment based on a cotton futures contract, illegal in Mississippi. The United States Supreme Court held that Mississippi must give full faith and credit to the Missouri judgment even though such judgment violated its own public policy.

The "Fauntleroy Doctrine" was followed by our own Supreme Court in *Mottu v. Davis*, 151 N.C. 237, 65 S.E. 969 (1909). Plaintiff in that case instituted action in North Carolina on a Virginia judgment obtained against defendant on a gambling debt. Defendant contended that such judgment was illegal, recovery therefrom forbidden by public policy and express provision of the North Carolina gaming statute. To this contention, the *Mottu* Court responded: "[T]he question presented has been recently decided against the defendant's position by the Supreme Court of the United States, the final arbiter of such matters[.]" *Id.* at 240, 65 S.E. at 971.

Defendant points to numerous decisions in which we have stated that a judgment of a court in another state may be attacked on grounds of lack of jurisdiction, fraud in the procurement, or as being against public policy. See, e.g., *Howland v. Stitzer*, 231 N.C. 528, 58 S.E. 2d 104 (1950); *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E. 2d 2 (1979). (Emphasis added.) Although we have so asserted, it is rare that we will disregard a sister state judgment on public policy grounds. The *Fauntleroy* decision, as noted by a recent commentator, "narrows almost to the vanishing point the area of state public policy relief from the mandate of the Full Faith and Credit Clause—at least so far as the judgments of sister states are concerned." Wurfel, *Recognition of Foreign Judgments*, 50 N.C. L. Rev. 21, 43 (1971). One exception to the full faith and credit rule is a penal judgment; a state need not enforce the penal judgment of another state. *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892).

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Another exception is when the judgment sought to be enforced is against the public policy of the state where it was initially rendered. *Cody v. Hovey*, 216 N.C. 391, 5 S.E. 2d 165 (1939); *Mottu v. Davis*, *supra*. The exceptions, however, are few and far between. *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, 143 A.L.R. 1273 (1942). In general, we are bound by the Full Faith and Credit Clause to recognize and enforce a valid judgment for the payment of money rendered in a sister state. *Sainz v. Sainz*, 36 N.C. App. 744, 747, 245 S.E. 2d 372, 375 (1978), *citing* Restatement (Second) Conflict of Laws, §§ 93 & 100 (1971).

Defendants rely on *Bullington v. Angel*, 220 N.C. 18, 16 S.E. 2d 411, 136 A.L.R. 1054 (1941), 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947) to support their contention that the trial court had no jurisdiction in this matter. Defendants' reliance is misplaced and their contention without merit. In *Bullington v. Angel*, the vendor, a resident of Virginia, instituted action in North Carolina to recover a deficiency owed by the vendee, a resident of North Carolina, who had purchased land in Virginia. Our Supreme Court refused to entertain the suit, explaining that our anti-deficiency statute, G.S. 45-21.38, was procedural in nature and limited the jurisdiction of our courts. Whether the statute is procedural or substantive is not at issue here. Plaintiff's present action concerns the enforcement of a judgment already rendered, not a deficiency sought to be collected. Defendant does not attack the jurisdiction of the Florida court rendering the deficiency judgment. Such judgment, valid and enforceable in Florida, is entitled to full faith and credit here.

Defendants contend that plaintiff's status as a foreign corporation removes this case from the mandate of the Full Faith and Credit Clause. Defendants' contention has no merit. Plaintiff's status does not affect our duty to honor the Florida judgment.

Defendants lastly contend that the trial court erred in failing to rule on their motion for sanctions under Rule 37 and their motion to amend their answer under Rule 15 of the Rules of Civil Procedure. We find no error. Since the pleadings failed to present any material, controverted issues of fact, the trial court was correct in granting plaintiff judgment on the pleadings as a matter of law. *See Trust Co. v. Elzey*, 26 N.C. App. 29, 214 S.E. 2d 800, *cert. denied*, 288 N.C. 252, 217 S.E. 2d 662 (1975). It would have been futile to rule on defendants' motions.

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Affirmed.

Judge BRASWELL concurs.

Judge WELLS dissents.

Judge WELLS dissenting:

In these times, speculators in real property ventures often solicit investments on a nationwide basis. I believe that these circumstances make it just as important today as it was when *Bullington v. Angel*, 220 N.C. 18, 16 S.E. 2d 411 (1941), *see also Angel v. Bullington*, 330 U.S. 183, 67 S.Ct. 657, 91 L.Ed. 832 (1947) was written that we continue to adhere to the public policy doctrine position adopted then, and that we accordingly continue to deny access to our courts to obtain or enforce judgments for real property purchase money deficiency judgments. For these reasons, I vote to reverse the trial court, it being my position that the defendant was entitled to summary judgment.

LARRY JOE MARTIN, EMPLOYEE-PLAINTIFF v. PETROLEUM TANK SERVICE,
EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER-DEFEND-
ANT

No. 8310IC429

(Filed 20 December 1983)

1. Master and Servant § 68.1— time for filing claim for silicosis—two-prong test

A two-prong test applies to trigger the running of the two-year period within which a claim for silicosis must be filed: (1) the time at which the employee is disabled within the meaning of G.S. 97-54 by his inability to work and (2) the time at which the employee is informed of his disease by competent medical authority.

2. Master and Servant § 68.1— claim for silicosis—filing in apt time

Although plaintiff learned from a competent medical authority in early 1978 that he had the occupational disease silicosis, his claim for silicosis filed 15 October 1981 was filed within the two-year period set forth in G.S. 97-58(c) where he continued working in other full-time jobs at comparable wages after he left employment by defendant as a sandblaster in 1978 until he was forced to discontinue working as a painter in August 1981 because of his silicosis.

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3. Master and Servant § 68.1— disablement from silicosis

Even if disablement from silicosis is measured from the time a claimant can no longer work at "dusty trades" rather than at any job, the evidence was sufficient to support a finding by the Industrial Commission that claimant was disabled in 1981 when he was forced to discontinue working rather than when he learned that he had silicosis in 1978 where it tended to show that claimant's doctor recommended in 1978 that claimant no longer work as a sandblaster, but there was no showing that claimant was "unable" to earn comparable wages in a dusty trade had he chosen to do so. G.S. 97-54.

APPEAL by defendants from the North Carolina Industrial Commission. The opinion and award was entered 18 November 1982. Heard in the Court of Appeals 9 December 1983.

Following a hearing on 26 May 1982, Deputy Commissioner Lisa Shepherd determined that plaintiff was seventy percent disabled from silicosis and awarded him 104 weeks of disability payments. Defendant-employer and defendant-insurance carrier appealed to the Full Commission, which adopted and affirmed Deputy Commissioner Shepherd's opinion and award. The facts found by Deputy Commissioner Shepherd and adopted by the Full Commission reveal the following events.

Plaintiff dropped out of high school at age fifteen in 1968, and went to work for defendant-employer as a sandblaster. Plaintiff worked for defendant-employer off and on over the next ten years. During this time, plaintiff began to experience breathing problems, and was hospitalized several times. In early 1978 a doctor diagnosed plaintiff's illness as silicosis and plaintiff left his job with defendant-employer.

From early 1978 until August 1981, plaintiff worked full time at other jobs, including cleaning cars and painting, earning wages comparable to those he received from defendant-employer. In mid-August 1981, however, plaintiff became disabled due to silicosis and was forced to discontinue working. He filed a claim for disability benefits with the Industrial Commission on 15 October 1981. Defendants do not contend that plaintiff's silicosis is due to some cause other than his employment as a sandblaster for defendant-employer.

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Swofford, Poliakoff and Spears, by Gary W. Poliakoff and Christ Christ, for plaintiff.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson, for defendants.

WELLS, Judge.

In their first assignment of error, defendants assert that the Full Commission erred in failing to find that plaintiff's claims are barred by G.S. § 97-58(a) and (c). Under G.S. § 97-58(c) "[t]he right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement" Defendants contend that plaintiff did not file his claim within two years of his disablement and that the Industrial Commission therefore was without jurisdiction to hear his suit. *See Poythress v. J. P. Stevens Co.*, 54 N.C. App. 376, 283 S.E. 2d 573 (1981), *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982).

We turn, therefore, to a consideration of the question of when disablement occurs within the meaning of the two year claim requirement for silicosis cases. Disablement in asbestosis and silicosis cases is defined as ". . . the event of becoming actually incapacitated because of asbestosis or silicosis to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis or silicosis. . . ." G.S. § 97-54.

The statutory definition of disablement was further refined by our Supreme Court in *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410 (1951). In *Duncan*, the plaintiff began working in trades exposing him to silica dust in 1912. Plaintiff developed a persistent cough, sore lungs and shortness of breath by 1946, but was not notified by competent medical authority that he had silicosis until November 1948. Plaintiff quit his job in a mineral plant on 23 April 1948, and filed a claim for compensation with the Industrial Commission on 25 April 1949. Under the Workers' Compensation statutes as they appeared at the time, "[t]he term 'disablement' . . . as applied to cases of asbestosis and silicosis means the event of becoming actually incapacitated, because of such occupational disease, from performing normal labor in the last occupation in which remuneratively employed . . ." G.S.

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§ 97-54. Under G.S. § 97-58(c) a claimant had to file his or her claim within one year (now two years) of disability or disablement.

The issue in *Duncan*, therefore, was how to determine the point at which claimant became disabled within the meaning of G.S. § 97-54 and § 97-58(c). Clearly, if inability to work was the criterion triggering the one year claim period, plaintiff would be barred, since he filed a year and two days after discontinuing work. The court, however, held that “. . . disablement, for the purpose of notice and claim for compensation, should date from the time the employee was notified by competent medical authority that he had such disease.” The rationale behind *Duncan* was clearly the court's reluctance to permit a claimant's right to benefits to expire before the claimant was even aware that he suffered from a compensable disease.

[1] *Duncan*, therefore, provides a two-prong test to trigger the running of the claim period: (1) the time at which employee is disabled within the meaning of G.S. § 97-54 by his inability to work and (2) the time at which employee is informed of his disease by competent medical authority. *Duncan* dealt expressly only with the situation in which a claimant becomes unable to work *before* his disease is diagnosed, holding that the claim period is triggered when the claimant is notified by competent medical authorities of his illness, and there is nothing in *Duncan* to indicate that diagnosis is the *sole* triggering event, it being implicit in the holding that disability was also crucial. Cases decided after *Duncan* discuss both disability and diagnosis. See, e.g., *Huskins v. Feldspar Corp.*, 241 N.C. 128, 84 S.E. 2d 645 (1954), *Brinkley v. United Feldspar & Minerals Corp.*, 246 N.C. 17, 97 S.E. 2d 419 (1957).

[2] While claimant in our case learned of his disease *before* he was disabled within the meaning of G.S. § 97-54, there appears no reason to apply a rule other than the two-prong test of *Duncan*. Compare also *Dowdy v. Fieldcrest Mills*, 308 N.C. 701, 304 S.E. 2d 215 (1983) requiring a similar two-pronged test in byssinosis cases, and overruling by implication language holding simply that the two-year claims period begins running when claimant is notified of the nature of his disease. See, e.g., *Clary v. A.M. Smyre Mfg. Co.*, 61 N.C. App. 254, 300 S.E. 2d 704 (1983) and cases cited therein.

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Defendants point to language in *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), which they argue changes the definition of disablement in silicosis and asbestosis cases. The *Taylor* court noted that "... disablement from silicosis and asbestosis is measured from the time a claimant can no longer work at dusty trades, not from the time he can no longer work at any job. G.S. § 97-54." (Emphasis in original.)

While the quoted language appears to support defendant's position, we hold that it is not dispositive of the issues in this case. First, *Taylor* involved a claim for byssinosis, and thus the court's remarks concerning silicosis were mere dicta. Second, G.S. § 97-54, which is the only authority cited to bolster the *Taylor* court's "dusty trades" language, does not in fact support this requirement. The statute clearly states that disablement begins when a claimant is incapacitated because of asbestosis or silicosis from earning in the same *or any other employment* the wages he earned at the time of his last injurious exposure to silicosis or asbestosis. The statute simply does not require that the "any other employment" be a "dusty" trade. Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning. *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977).

[3] Even if the *Taylor* "dusty trades" requirement was read into G.S. § 97-54 in silicosis cases, we hold there is sufficient evidence in the record to support the Industrial Commission's finding of fact that claimant was disabled in 1981. Under G.S. § 97-54, a claimant is disabled when he is unable to earn wages comparable to those he earned at the time of his last exposure to an injurious substance. There is no showing in the case before us, that claimant was unable to work in dusty trades between 1978, when he learned he had silicosis, and 1981, when he resigned from his painting job. It is true that claimant's doctor recommended in 1978 that claimant refrain from further sandblasting, but this is not a sufficient showing that claimant was *unable* to earn comparable wages in a "dusty" trade had he chosen to do so. In fact, the uncontroverted testimony in the record shows that claimant asked for his old job as a sandblaster after he was discharged from the hospital in February, 1978, and again on several other occasions. The only apparent reason plaintiff did not return to his

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sandblasting job, according to the evidence in the record, is because his employer told him there was no opening. Findings of fact by the Industrial Commission are conclusive on appeal when supported by competent evidence even though there is evidence to support contrary findings. *Dowdy v. Fieldcrest Mills, supra*. Defendants' brief does not discuss their assignment of error based on G.S. § 97-58(a), and this argument is therefore abandoned. Rule 28(a) of the Rules of Appellate Procedure. Defendant's assignment of error is overruled.

In their second assignment of error, defendants contend that the Full Commission erred in finding that plaintiff was disabled in October 1981. The evidence in the case at bar indicates that claimant resigned his painting job in August, 1981 because of his health. At that time plaintiff's condition fulfilled the requirements of G.S. § 97-54, since plaintiff was then no longer capable of earning wages comparable to those he earned at the time of his last injurious exposure—that is, the last day he worked as a sandblaster in 1978. While we hold that the Industrial Commission erred in holding that claimant was disabled in October, 1981, we fail to see how this error prejudiced defendants in any way. Claimant filed his claim in October, 1981, well within the two year period counting either from August or October of 1981. Defendants' assignment of error is overruled.

Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. JOHN FITZGERALD STINSON

No. 8319SC199

(Filed 20 December 1983)

1. Criminal Law § 138— prior conviction punishable by more than 60 days— under a suspended sentence—two separate aggravating factors

A trial judge properly considered as two distinct aggravating factors that defendant had a prior conviction for an offense punishable by more than 60 days, and in addition, that defendant was under a suspended sentence for the prior felony conviction.

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2. Criminal Law § 88.1— cross-examination clarifying earlier testimony of witness—properly admitted

The trial court properly admitted testimony over the objection of defendant regarding the lack of any evidence linking anyone other than defendant to the victim's dorm room since it clarified the witness's earlier testimony made on direct examination and was not irrelevant and prejudicial.

3. Burglary and Unlawful Breakings § 5; Rape and Allied Offenses § 18.2— first degree burglary and attempted second degree rape—sufficiency of evidence

The evidence was sufficient to support verdicts of first degree burglary and attempted second degree rape where the evidence tended to show that in the early morning hours the victim was awakened when someone entered her dorm room, jumped on her back, and put his hand over her mouth; the intruder said he wasn't going to hurt her and that the only thing he wanted was sex; that the intruder repeated the phrase that the only thing he wanted was sex; that the victim struggled with the intruder, ultimately landing on the floor with him on her back; that during the struggle, she was hit a number of times in her face; that the victim finally agreed to do what the man asked, and the intruder released her; that she ran out of her dorm room; that the intruder also ran out of the room and into a well-lighted suite lobby; and that at that time the victim saw the intruder's face and recognized him as defendant.

Judge BECTON dissenting.

APPEAL by defendant from *Albright, Judge*. Judgment entered 6 October 1982 in Superior Court, CABARRUS County. Heard in the Court of Appeals 25 October 1983.

Defendant was tried on indictments charging him with first degree burglary and attempted second degree rape. On 3 April 1982 Yolanda Lineberger, a student at Barber Scotia College, was watching television in her dorm room while laying across her bed, fully clothed. She fell asleep sometime after 8:00 p.m. When she fell asleep the doors and windows of her room were closed.

At approximately 2:10 a.m. Lineberger was awakened when someone entered her room, jumped on her back, and put his hand over her mouth. She testified that the man said he wasn't going to hurt her and that the only thing he wanted was sex. He repeated the phrase that the only thing he wanted was sex. Lineberger struggled with the intruder, ultimately landing on the floor with him on her back. During the struggle, she was hit a number of times in her face.

Lineberger finally agreed to do what the man asked, and he released her. She then ran out of her dorm room. The intruder

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also ran out of the room and into the well lighted suite lobby. At that time Lineberger saw his face and recognized him as defendant, a non-student who lived near campus and who was commonly referred to as "John Boy."

At the close of all the evidence, defendant moved to dismiss, and the motion was denied. Defendant then moved for a directed verdict, and that motion was also denied. After the jury found defendant guilty of first degree burglary and attempted second degree rape, defendant moved for judgment notwithstanding the verdict, and that motion was denied.

In sentencing defendant, the court found as a mitigating factor the fact that defendant was a minor and had reliable supervision available. As aggravating factors, the court found that defendant had a prior conviction for felonious breaking and entering, punishable by more than 60 days, and that defendant committed the offense currently under consideration while under a suspended sentence. For the offense of first degree burglary, which carries a presumptive sentence of 15 years and a maximum penalty of 50 years to life imprisonment, defendant was sentenced to 20 years in prison. For the offense of second degree attempted rape, which carries a presumptive sentence of three years and a maximum penalty of 10 years, defendant was sentenced to five years in prison. The court ordered that these sentences run consecutively. From these proceedings, defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Robert M. Critz for defendant-appellant.

ARNOLD, Judge.

[1] Defendant claims that the two aggravating factors found by the court were, in effect, one factor, thereby requiring a new sentencing hearing. *See State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983). We disagree. Defendant had a prior conviction for an offense punishable by more than 60 days. In addition, at the very time he committed the offense of first degree burglary and attempted second degree rape, he was under a suspended sentence for the prior felony conviction. These are two clearly distinct aggravating factors. We find that the trial judge properly considered them in sentencing defendant.

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Moreover, defendant's contention that the 25-year sentence is "clearly harsh, gross and abusive" is without merit. A trial judge has the authority to provide that two or more sentences imposed for separate offenses shall run consecutively. *State v. Mosteller*, 3 N.C. App. 67, 164 S.E. 2d 27 (1968). Furthermore, both sentences were within statutory limits and, therefore, did not constitute cruel and unusual punishment. See *State v. Handsome*, 300 N.C. 313, 266 S.E. 2d 670 (1980).

[2] Defendant next contends that the trial court erred in admitting testimony over the objection of defendant regarding the lack of any evidence linking anyone other than defendant to the victim's dorm room. During his cross-examination of Sgt. W. L. Arthur, defendant elicited the statement that "I found no physical evidence in her room, her suite hallway, or elsewhere linking Mr. Stinson to have been there that night." On redirect examination, Sgt. Arthur was asked, over the defendant's objection, "Did you find any evidence linking anyone else to that room?" The witness answered, "No sir, I didn't."

This evidence was not irrelevant and prejudicial, as defendant contends. It was brought out for the purpose of clarifying Sgt. Arthur's earlier testimony on direct examination. 1 Brandis, N.C. Evidence, § 36 (2d Rev. 1982). We find the testimony was properly allowed.

[3] Defendant also claims that the court erred in denying his motions for dismissal and for a directed verdict at the close of all the evidence and in denying his motion for judgment notwithstanding the verdict. The question presented by a defendant's motion to dismiss in a criminal case is whether or not the evidence is sufficient to warrant its submission to the jury and to support a verdict of guilty of the offense charged in the indictment. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). Where the evidence is sufficient to overrule a motion to dismiss, it will also be sufficient to overrule a motion for a directed verdict, since both motions have the same legal effect. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967). Upon a motion to dismiss, "all of the evidence favorable to the State, whether competent or incompetent, must be considered, such evidence must be deemed true and considered in the light most favorable to the State, discrepancies and contradictions therein are disregarded and the State is entitled to

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every inference of fact which may be reasonably deduced therefrom." *State v. Witherspoon*, 293 N.C. 321, 326, 237 S.E. 2d 822, 826 (1977).

In the case before us, it is clear that the State presented evidence of each and every element necessary to support a conviction of both first degree burglary and attempted second degree rape. Since all the evidence must be taken in the light most favorable to the State, we find that the trial court properly denied defendant's motions for dismissal and for a directed verdict. In addition, we find that the trial judge did not abuse his discretion in denying defendant's motion for judgment notwithstanding the verdict. See *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1976).

We have examined defendant's remaining assignment of error and have found in it no merit.

No error.

Judge HEDRICK concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

I concur in the majority's resolution that there was no error in defendant's trial. However, believing that it is improper to increase a defendant's sentence upon findings that (a) "defendant had a prior conviction for an offense punishable by more than 60 days" and (b) that defendant "was under a suspended sentence for the [same] prior felony conviction," ante p. 3, I dissent. The sentence one receives, whether active or suspended, is the same as, or at least subsumed within, one's only prior conviction. See *State v. Isom*, 65 N.C. App. 223 (1983).

Considering the fact that the legislature sought to deal with "pretrial" transgressions of the law by specifically including as a statutory aggravating factor that "[t]he defendant committed the offense while on pretrial release on another felony charge," N.C. Gen. Stat. § 15A-1340.4(a)(1)(k) (Supp. 1981), I find it significant that the legislature made no reference to the commission of an of-

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fense by a defendant serving a suspended sentence. I am convinced that the legislature sought to deal with post-conviction transgressions of the law in one way—by allowing judges to consider a prior conviction for an offense punishable by more than sixty days' confinement. N.C. Gen. Stat. § 15A-1340.4(a)(1)(o) (Supp. 1981). Mindful of the possibility that a defendant's sentence might be twice enhanced because of one fact, circumstance or transaction, the legislature specifically said that "prior convictions do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced." *Id.* Similarly, the last paragraph of the statute listing aggravating factors states the "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation." N.C. Gen. Stat. § 15A-1340.4(a)(1) (Supp. 1981).

More fundamentally, the trial court's "double-clutch" action in this case frustrates one of the underlying purposes in enacting the Fair Sentencing Act—to equalize sentences. And the trial judge's action in this case is only one of the ways trial judges are "doubling up" on defendants who have prior convictions. In *State v. Isom*, the trial judge found as separate aggravating factors that defendant had a prior conviction and that the defendant had served a prior prison term. Allowing trial judges, once they find that a defendant has a prior conviction, to further increase a defendant's sentence *in every case*, by finding, depending on the facts, that the defendant received a suspended sentence or active sentence, is not what the Fair Sentencing Act is about. Consequently, I would remand this matter for a new sentencing hearing.

News & Observer v. State; Co. of Wake v. State; Murphy v. State

NEWS & OBSERVER PUBLISHING COMPANY v. STATE OF NORTH CAROLINA, *EX REL.* HAYWOOD STARLING, DIRECTOR OF THE STATE BUREAU OF INVESTIGATION

THE COUNTY OF WAKE v. STATE OF NORTH CAROLINA, *EX REL.* HAYWOOD STARLING, DIRECTOR OF THE STATE BUREAU OF INVESTIGATION, IN HIS OFFICIAL CAPACITY

DR. JOHN A. MURPHY v. STATE OF NORTH CAROLINA, *EX REL.* HAYWOOD STARLING, DIRECTOR OF THE STATE BUREAU OF INVESTIGATION, IN HIS OFFICIAL CAPACITY

No. 8210SC1087

(Filed 20 December 1983)

Public Records § 1— SBI report—available to public—no abuse of discretion

There was no abuse of discretion in a trial judge's decision to make an SBI report on the activities of a school superintendent available to the public. G.S. 114-15.

APPEAL by respondent from *Bailey, Judge*. Order entered 24 September 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 1 September 1983.

This is an appeal from an order to make public the materials collected in an investigation by the North Carolina State Bureau of Investigation. The SBI, at the request of the District Attorney of Wake County, made an investigation of the activities of Dr. John A. Murphy while he was Superintendent of Schools for Wake County. After examining the report, the District Attorney announced he would not institute any criminal action against Dr. Murphy.

The News and Observer Publishing Company filed a petition in the Superior Court of Wake County praying for an order that the SBI report as to the activities of Dr. Murphy, including any related matters contained therein, be made public. Wake County filed a petition in which it asked that copies of the report be given to the County Manager, the County Attorney, and their assistants. Dr. Murphy filed a petition in which he asked that the report be given to him. The respondent filed answers to the three petitions and asked that they be dismissed.

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Judge Bailey found that the public interest in having information upon which to judge public officials outweighed the interest of the SBI in keeping the report confidential and ordered that the contents of the report be made available to the public. The respondent appealed.

Attorney General Edmisten, by Senior Deputy Attorney General Andrew A. Vanore, Jr., Assistant Attorney General J. Michael Carpenter, and Associate Attorney Daniel C. Higgins, for the State.

County Attorney Michael R. Ferrell for the County of Wake.

Sanford, Adams, McCullough and Beard, by H. Hugh Stevens, Jr. and Nancy Bentson Essex, for petitioner appellee News and Observer Publishing Company.

WEBB, Judge.

This appeal involves the interpretation of G.S. 114-15 which provides in part:

"All records and evidence collected and compiled by the Director of the Bureau and his assistants shall not be considered public records within the meaning of G.S. 132-1, and following, of the General Statutes of North Carolina and may be made available to the public only upon an order of a court of competent jurisdiction."

We believe that under this section of the statute the General Assembly intended that in some cases SBI reports in criminal investigations should be made public. The statute gives no guidelines as to when this may be done and we believe that it was within Judge Bailey's discretion as to whether it should be done in this case. If we cannot hold that he abused his discretion, we cannot disturb this order.

In exercising his discretion Judge Bailey balanced the interests of the public in having information as to the actions of their officials against the SBI and public interest in keeping investigative reports confidential. He took judicial notice of the fact that expenditures for public schools exceed all other categories of governmental appropriations in this state and it is of major public interest as to how the official is functioning who is en-

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trusted with responsibility for the day-to-day operations of the Wake County Public Schools. Judge Bailey also took notice of the fact that the public has an interest in knowing facts as to the functioning of the Wake County Board of Education, which hired and supervised Dr. Murphy and the District Attorney who made the decision not to prosecute him. The court recited in its order that it had offered to excise from the report the names of any persons who had been promised confidentiality but the respondent had not given the court the names of any such persons.

We hold that on these findings we cannot say the court abused its discretion in ordering the report to be made public.

The respondent, relying on *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964); *State v. Tune*, 13 N.J. 203, 98 A. 2d 881 (1953), later appealed, *State v. Tune*, 17 N.J. 100, 110 A. 2d 99 (1954), cert. denied, *Tune v. N.J.*, 349 U.S. 907, 75 S.Ct. 584, 99 L.Ed. 1243 (1955); and *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972), argues that the "inspection of privileged material is to be a rare situation and only upon a showing of substantial and legitimate necessity by those seeking access." He argues further that "the interests to be balanced are those of the individual seeking inspection versus the public's substantial interest in protecting the ability of law enforcement officers to detect, investigate and prosecute criminal wrongdoing." He contends there has been no showing in this case by any of the petitioners of a legitimate entitlement.

We do not read the statute as does the respondent. The statute contemplates that the results of SBI investigations "may be made available to the public." We do not think that consistent with this language the release of an SBI report should depend on the interest of any one individual. We believe it is the public interest which should be considered in determining whether an SBI report should be released. Judge Bailey made findings as to the public interest. We believe his order based on these findings was within his discretion.

We do not believe any of the cases relied on by the respondent is helpful to his position. *State v. Davis*, *supra*, and *State v. Tune*, *supra*, do not deal with G.S. 114-15. *State v. Goldberg*, *supra*, affirms an order of the superior court which refused to order than an SBI report be released.

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The respondent assigns error to the court's finding of fact as to the importance of Dr. Murphy's position, the large expenditures of money for public education, the interest of the public in the conduct of the Superintendent of Schools for Wake County, the Wake County Board of Education and the District Attorney, and the importance of the material in the SBI report. The respondent argues that none of these findings of fact are supported by the evidence. We believe all of them are matters of general knowledge of which the court could take judicial notice. *See State v. Vick*, 213 N.C. 235, 195 S.E. 779 (1938).

The respondent also argues that the court's finding of fact that "most of the individuals interviewed by the SBI were aware that their responses might well become public knowledge eventually" is not supported by the record. The affidavit of Claude H. Green, an SBI agent who participated in the investigation, stated most of the individuals were told that the information they provided "would not be disclosed unless they were called as a witness in a judicial proceeding." We believe this supports the finding of fact.

Affirmed.

Judges HEDRICK and HILL concur.

SALLYE BROWN, SUBSTITUTE ADMINISTRATRIX OF THE ESTATE OF WHELETE
VENITA COLLINS v. NORTH CAROLINA WESLEYAN COLLEGE, INC.

No. 827SC1275

(Filed 20 December 1983)

Colleges and Universities § 4; Negligence § 57.10— liability of college or university for criminal attack by third person upon students—summary judgment for defendant proper

The foreseeability of a criminal assault determines a college's duty to safeguard its students from criminal acts of third persons; therefore, evidence that the most serious crimes on defendant's campus in the past were a break-in at the college business office approximately 10-12 years prior to the assault on plaintiff's intestate, a break-in and vandalism of some vending machines approximately five years prior to the assault on plaintiff's intestate, a reported attempted rape in 1978, a fight between campus students and community

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youth on campus in 1980, and the fact that inmates from a detention center attended the college's home basketball games were insufficient to raise a triable issue as to whether the abduction and subsequent murder of plaintiff's intestate was reasonably foreseeable. Even if there was a duty, the forecast of evidence disclosed no breach of the duty where defendant's affidavits tended to show that defendant had a security staff composed of three full-time students, two full-time non-students, and a Director of Security; that at least one security officer was on duty each hour of the day; a security officer was responsible for, among other things, reporting lighting problems to the Director and replacing burned out bulbs on buildings; each officer was equipped with a uniform, a mobile radio, and had access to a recognizable security vehicle; and in addition, the campus, which had 408 residents in 1980, was regularly patrolled by members of the Nash County Sheriff's Department.

APPEAL by plaintiff from *Rouse, Judge*. Judgment entered 12 July 1982 in Superior Court, NASH County. Heard in the Court of Appeals 25 October 1983.

Amos E. Link, Jr., for plaintiff appellant.

Horton & Michaels, by Walter L. Horton, Jr., and John A. Michaels, for defendant appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Joseph W. Grier, Jr. and Christian R. Troy, amicus curiae North Carolina Association of Independent Colleges and Universities.

BECTION, Judge.

On 3 December 1980, after a basketball game, plaintiff's intestate, a non-resident student and a cheerleader at defendant North Carolina Wesleyan College, was abducted from defendant's campus, along with two other cheerleaders, and was forced by one Kermit Smith to drive to a rock quarry near Roanoke Rapids, North Carolina, where she was raped and murdered. Smith was subsequently tried and convicted of the crimes. His convictions were upheld by the North Carolina Supreme Court. *See State v. Smith*, 305 N.C. 691, 292 S.E. 2d 264, cert. denied, --- U.S. ---, 74 L.Ed. 2d 622, 103 S.Ct. 474 (1982).

This appeal concerns the liability of a college or university for a criminal attack by a third person upon its students. The trial court granted summary judgment for the defendant. For the reasons that follow, we hold that summary judgment was proper in this case.

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I

Plaintiff filed this action on 3 December 1981 alleging that defendant was negligent in that it (a) allowed people which it knew or should have known to have unsavory character and dangerous propensities to loiter on its campus; (b) knew or should have known of Smith's presence on its campus, and failed to require him to leave; (c) failed to adequately light and keep in a reasonably safe condition its parking lots and common areas; (d) violated its duty to exercise due care by failing to provide adequate security for its students within its common areas and parking lots; (e) violated its duty to exercise due care in protecting its students from foreseeable criminal assaults by third persons on the common premises; and (f) violated its duty to warn plaintiff's intestate of the dangerous conditions on its campus. The complaint also alleged causes of actions for defendant's breach of its own security rules and the North Carolina General Statutes, breach of warranty, and breach of covenant of quiet enjoyment.

Defendant filed an answer denying the material allegations of the complaint, and moved for summary judgment. Based upon the pleadings, affidavits, and transcript excerpts presented from Smith's trial, the trial court granted defendant's motion. Plaintiff appeals.

II

As a general rule, a landowner has no duty to protect one on his premises from criminal attack by a third person, but if such an attack is reasonably foreseeable, such a duty may arise between a landowner and his invitee. 62 Am. Jur. 2d *Premises Liability* § 26 (1972). Our Supreme Court, in *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E. 2d 36 (1981), recently embraced foreseeability as the standard for determining the extent of a landowner's duty to protect his business invitees from the criminal acts of third persons. In *Foster*, the plaintiff was assaulted and robbed in the parking lot of defendant's shopping mall. In holding that foreseeability is the test, the court quoted the Restatement (Second) of Torts § 344 (1963):

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such

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a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment f to section 344 further provides:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of the third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.

303 N.C. at 639-40, 281 S.E. 2d at 38-39. The *Foster* Court held that plaintiff's forecast of evidence, revealing 31 reported incidents of criminal activity in defendant's parking lot in the twelve months prior to her assault, was sufficient to raise a genuine issue of material fact as to whether an assault upon the plaintiff was reasonably foreseeable. *Accord Urbano v. Days Inn of America, Inc.*, 58 N.C. App. 795, 295 S.E. 2d 240 (1982).

Recently, our Supreme Court held that a parent may incur tort liability for the criminal assault of a child if it can be shown "that the parent knew or in the exercise of due care should have known of the [dangerous] propensities of the child and could have reasonably foreseen that failure to control those propensities would result in injurious consequences." *Moore v. Crumpton*, 306 N.C. 618, 624, 295 S.E. 2d 436, 440 (1982).

More recently, this Court held that the "foreseeability of harm to pupils in the class or at the school is the test of the ex-

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tent of the teacher's duty to safeguard her pupils from dangerous acts of fellow pupils. . . ." *James v. Charlotte-Mecklenburg Board of Education*, 60 N.C. App. 642, 648, 300 S.E. 2d 21, 24 (1983).

It follows from these decisions that a college can be liable for a criminal assault by a third party upon one of its students under certain circumstances. Foreseeability of a criminal assault, however, determines a college's duty to safeguard its students from criminal acts of third persons. This position is in accord with the decisions of other states. See *Chavez v. Tolleson Elementary School Dist.*, 122 Ariz. 472, 595 P. 2d 1017 (Ct. App. 1979); *Relyea v. State*, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980); see also Annot., 1 A.L.R. 4th 1099 (1980).

III

We now examine the forecasts of evidence to determine whether there was a repeated course of conduct such as to put defendant on notice that it was reasonably foreseeable that an attack upon plaintiff's intestate might occur.

The affidavits presented by defendant tend to indicate that the most serious crimes on campus in the past were a break-in at the college business office approximately 10-12 years prior to the assault on plaintiff's intestate, a break-in and vandalism of some vending machines approximately five years prior to the assault on plaintiff's intestate, and a reported attempted rape in 1978. On the other hand, plaintiff's lone affidavit, that of Yolanda Woods, who was also kidnapped by Smith, tends to indicate that there had been a fight between campus students and some community youth on campus in 1980. Ms. Woods also stated in her deposition that, prior to 3 December 1980, inmates from the Richard T. Fountain Detention Center for Boys attended the college's home basketball games, and based upon her information and belief, these inmates also attended the basketball game on 3 December 1980.

Based upon this forecast of evidence, we conclude that the scattered incidents of crime through a period beginning in 1959 were not sufficient to raise a triable issue as to whether the abduction and subsequent murder of plaintiff's intestate was reasonably foreseeable. The forecast of evidence does not show a repeated course of criminal activity which would have imposed a

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duty upon defendant to keep its campus safe. There is nothing in the record to indicate that the inmates from the detention center were dangerous, unchaperoned, or had caused problems in the past, or that persons which defendant knew had dangerous propensities were on campus that evening, or any evening.

Even if the one attempted rape in 1978 was sufficient to impose a duty upon defendant to safeguard its students from criminal assaults, the forecasts of evidence disclose no breach of duty. Defendant's affidavits tend to show that defendant had a security staff composed of three full-time students, two full-time non-students, and a Director of Security in 1980. At least one security officer was on duty each hour of the day. A security officer was responsible for, among other things, reporting lighting problems to the Director and replacing burned out bulbs on buildings. Each officer was equipped with a uniform, a mobile radio, and has access to a recognizable security vehicle. In addition, the campus, which had 408 residents in 1980, was regularly patrolled by members of the Nash County Sheriff's Department.

Ms. Woods's affidavit, on the other hand, tends to indicate that several of the lights on campus were broken that evening and that defendant only had one plainclothes security officer on duty at the time of the abduction. Ms. Woods's affidavit, however, does not indicate that the lighting was poor in the area where she was abducted.

IV

Plaintiff only argues her cause of action for negligence in her brief. She is thereby deemed to have abandoned her other causes of action pursuant to Rule 28 of the North Carolina Rules of Appellate Procedure. *Crockett v. First Federal Sav. & Loan Ass'n*, 289 N.C. 620, 224 S.E. 2d 580 (1976).

V

Based upon the materials in the record, we conclude that there is no genuine issue of material fact, and thus summary judgment for defendant was proper. N.C. Gen. Stat. § 1A-1, Rule 56 (1969); *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). The judgment of the trial court is

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Affirmed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. HARVEST LEE INGRAM

No. 8318SC247

(Filed 20 December 1983)

1. Criminal Law § 162.6— general objections—court could properly overrule

In a prosecution for two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of possession of a firearm by a felon, defendant's general objection to testimony by the arresting officer which showed defendant had indicated that the pistol used was his was insufficient to require the trial judge to hold a voir dire concerning the admissibility of testimony. If the motion fails to allege a legal or factual basis for suppression, the trial court may summarily dismiss it. Even assuming error, however, it was harmless beyond a reasonable doubt since the challenged statements concerned only the ownership of a firearm, and the evidence against the defendant was overwhelming. G.S. 15A-974, G.S. 15A-977(a), (c), (e), and G.S. 15A-1443(b).

2. Assault and Battery § 13.1; Criminal Law § 33— testimony irrelevant to issues tried—properly excluded

The trial court properly excluded evidence that a member of the victims' church had told defendant to leave his ex-wife alone, and not to come around her or their children since defendant laid no foundation to show the relevance of the testimony in that he did not plead self-defense, and he did not offer evidence of any dangerous fighting propensities on the part of either of his victims.

3. Criminal Law § 138— exclusion of mitigating factors—no error

The trial court did not err in failing to find as mitigating factors that (1) defendant "was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense," (2) defendant's "immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense," and (3) defendant "acted under strong provocation, or the relationship between [him] and the victim was otherwise extenuating" since although the evidence permitted findings of the mitigating factors which defendant contended, it did not compel them.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 20 August 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 October 1983.

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The State's evidence tended to show that defendant, while visiting his ex-wife, drew a pistol and shot both her and a man who was at her home. The jury found him guilty of two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of possession of a firearm by a felon.

From a judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defenders James H. Gold and Lorinzo L. Joyner, for defendant appellant.

WHICHARD, Judge.

GUILT PHASE

[1] Defendant contends the court committed prejudicial error by failing to hold a *voir dire* upon his general objection to the following testimony by the arresting officer, which he argues showed "a virtual confession to the charge of possession of a firearm by a felon":

Q. . . . tell the members of the jury what you asked him about this pistol, and what, if anything, his response was.

MR. MCCLELLAN: Objection, Your Honor.

MR. INGRAM: Object.

THE COURT: Overruled.

Q. . . . Go ahead.

A. I asked Mr. Ingram whose pistol this was; he replied, "It's mine."

I then asked him, where did he buy it; he replied he just bought it a few minutes ago. And he would not tell me where or who he bought it from.

To suppress such evidence on constitutional grounds, a timely and proper motion is necessary. G.S. 15A-974; *State v. Tate*, 300 N.C. 180, 265 S.E. 2d 223 (1980). The motion, whether oral or written, should state the legal ground upon which it is made. G.S.

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15A-977(a), (e); *State v. Satterfield*, 300 N.C. 621, 624-25, 268 S.E. 2d 510, 514 (1980). If the motion fails to allege a legal or factual basis for suppression, the trial court may summarily dismiss it. G.S. 15A-977(c), (e); *Satterfield, supra*; see also *State v. Conard*, 54 N.C. App. 243, 245, 282 S.E. 2d 501, 503 (1981). *Contra State v. Silva*, 304 N.C. 122, 131-33, 282 S.E. 2d 449, 455-56 (1981); *State v. Vickers*, 274 N.C. 311, 313-15, 163 S.E. 2d 481, 483-84 (1968). Defendant's general objection did not comply with the foregoing requirements, and the court thus could properly overrule it.

Assuming error, *arguendo*, under the circumstances presented we hold it harmless beyond a reasonable doubt. G.S. 15A-1443 (b). The challenged statements concerned only the ownership of a firearm. Both victims testified that defendant, without provocation, pulled a pistol from his jacket and shot them at close range. One victim positively identified a pistol introduced at trial as the weapon used. The arresting officer testified that he physically removed that weapon from defendant's person in subduing him, and he established a proper chain of custody. Five shots were fired during the incident, and the officer found five spent shells in the pistol.

Even without the statements, then, the evidence against defendant is overwhelming. His statements were made after the police had informed him of his *Miranda* rights and obtained a waiver. Under these circumstances, error, if any, was harmless beyond a reasonable doubt. See *State v. Brown*, 306 N.C. 151, 164-65, 293 S.E. 2d 569, 578, *cert. denied*, --- U.S. ---, 103 S.Ct. 503, 74 L.Ed. 2d 642 (1982).

[2] Defendant contends the court erred in excluding evidence that a member of the victims' church had told him to leave his ex-wife alone, and not to come around her or their children. He argues that this was a threat or warning which was relevant because it supported his claim that the victims were the aggressors.

Defendant laid no foundation to show the relevance of this testimony. He did not plead self-defense, and did not offer evidence of any dangerous fighting propensities on the part of either of his victims. The evidence was of tenuous relevance at best, and was of a kind generally excluded by our courts. See generally *State v. Dangerfield*, 32 N.C. App. 608, 614, 233 S.E. 2d

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663, 667, *disc. rev. denied*, 292 N.C. 642, 235 S.E. 2d 63 (1977); 1 H. Brandis, North Carolina Evidence § 162a (1982).

We thus find no error in the exclusion complained of. Assuming error, *arguendo*, in light of the circumstances hereinabove set forth defendant has not sustained his burden of showing prejudice therefrom. G.S. 15A-1443(a).

Defendant contends the court erred in failing to instruct on the defense of accident. He made no request for such instructions, however, and thus cannot assign their omission as error. N.C.R. App. P. 10(b)(2).

Further, we find no evidence that defendant was engaged in lawful activity so as to warrant such an instruction. *See State v. Faust*, 254 N.C. 101, 113, 118 S.E. 2d 769, 776-77, *cert. denied*, 368 U.S. 851, 82 S.Ct. 85, 7 L.Ed. 2d 49 (1961); *State v. Walker*, 34 N.C. App. 485, 487, 238 S.E. 2d 666, 667 (1977), *disc. rev. denied*, 294 N.C. 445, 241 S.E. 2d 847 (1978). Nor do we find the quantum of evidence such as to make accident a "substantial feature" of the case, thus warranting an instruction thereon. *Cf. State v. Wright*, 28 N.C. App. 481, 483, 221 S.E. 2d 745, 747 (1976); *State v. Moore*, 26 N.C. App. 193, 195, 215 S.E. 2d 171, 172, *cert. denied*, 288 N.C. 249, 217 S.E. 2d 673 (1975).

We find no error in the guilt phase of the trial.

SENTENCING PHASE

[3] Defendant contends the court erred in failing to find the following mitigating factors, set forth in G.S. 15A-1340.4(a)(2)d., e., and i.: (1) that he "was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense," (2) that his "immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense," and (3) that he "acted under strong provocation, or the relationship between [him] and the victim was otherwise extenuating." He argues that the uncontradicted evidence clearly established the existence of these factors, and that the court thus was required, under the decision of this Court in *State v. Graham*, 61 N.C. App. 271, 300 S.E. 2d 716 (1983), to find them. *See also State v. Jones*, 309 N.C. 214, 218-19, 306 S.E. 2d 451, 454 (1983) ("[w]hen evidence

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in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act").

Defendant is required, however, to prove mitigating factors by a preponderance of the evidence. See *State v. Blackwelder*, 309 N.C. 410, 419, 306 S.E. 2d 783, 789 (1983). "[H]is position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that 'the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn'" *Jones, supra*, 309 N.C. at 219-20, 306 S.E. 2d at 455.

While the evidence permitted findings of the mitigating factors for which defendant contends, it did not, under the foregoing standard, compel them. As to the first two factors, at the sentencing hearing defendant relied on the report of a state psychiatrist. While that report stated that defendant "was responsible at the time of the alleged crime, with responsibility being mitigated by . . . chronic psychological problems," it also stated that his thoughts were well organized; no delusions were apparent; memory was adequate; concentration was good; he was oriented to time, place, and person; and his intellect was at least normal. Viewing the report as a whole, we hold that it permitted, but did not compel, a finding of the mitigating factors for which defendant contends.

As to the third factor, evidence as to defendant's relationship with the victims likewise was not uncontradicted. The male victim strongly denied any wrongdoing with regard to defendant's ex-wife. He testified that on the occasion in question no one was "arguing . . . or having any cross words with [defendant]." Both victims testified that they did nothing at the time of the assaults to provoke defendant. While extenuating relationships producing strong provocation conceivably could have been found, there was evidence which tended to negate such a finding; and it thus was not compelled.

For the foregoing reasons, we hold that the court did not err in failing to find that the mitigating factors for which defendant contends had been proven by a preponderance of the evidence.

First Nat'l Bank of Catawba Co. v. Burwell

No error.

Judges ARNOLD and BRASWELL concur.

FIRST NATIONAL BANK OF CATAWBA COUNTY, PLAINTIFF v. HORACE R. BURWELL AND WIFE, WANDA BURWELL, AND ZOLLIE E. HAMBY AND WIFE, MAUDE HAMBY, DEFENDANTS v. EARL A. McALISTER, JR., THIRD-PARTY DEFENDANT

No. 8225SC1346

(Filed 20 December 1983)

Guaranty § 2; Uniform Commercial Code § 32— issues submitted to jury sufficient

In an action brought by plaintiff bank to enforce a guaranty agreement for \$21,672.75 where the defendants' evidence tended to show that the Hambys had agreed to be guarantors for defendant Burwell only for the amount of \$5,000.00 and not for the full amount of the note which was a consolidation of previous loans defendant Burwell owed the bank, an issue submitted to the jury which stated "What amount, if any, are the defendants Zollie E. Hamby and Maude Hamby, indebted to [the plaintiff]? ANSWER:" was sufficient where the instructions stated in detail the defense of the defendant and the record indicated through questions by the jury in its deliberations that the jury was not confused. G.S. 25-3-115, G.S. 25-3-307(2), and G.S. 25-3-416.

APPEAL by defendants Zollie E. and Maude Hamby from *Grist, Judge*. Judgment entered 24 September 1982 in Superior Court, CATAWBA County. Heard in the Court of Appeals 17 November 1983.

Plaintiff bank brought this action against the makers and guarantors of a promissory note, seeking to recover a balance allegedly due thereon of \$21,672.75. As to the guarantors, a sole issue was submitted to, and answered by, the jury as follows: "What amount, if any, are the defendants, Zollie E. Hamby and Maude Hamby, indebted to [the plaintiff]? ANSWER: \$21,672.75."

Defendants Hamby (hereafter defendants), the guarantors, appeal from a judgment on the verdict for plaintiff in the sum of \$21,672.75, together with interest, attorney's fees, and costs.

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Sigmon, Clark and Mackie, by E. Fielding Clark, II, for plaintiff appellee.

Randy D. Duncan for defendant appellants.

WHICHARD, Judge.

Defendants contend the court erred in refusing to submit the following tendered issues: (1) "Was the note completed by the plaintiff as authorized by . . . defendants?" (2) "Was the note delivered to plaintiff upon condition that . . . defendants' liability be limited to \$5,000.00?" For reasons hereafter set forth, we find no error.

The factual basis of defendants' contention is as follows:

An officer of plaintiff bank testified that he had dealt with Horace Burwell, one of the makers, who was defendants' son-in-law, for a number of years. Burwell had outstanding notes with plaintiff totalling \$15,734. When he requested a further loan of \$5,000, the officer consolidated all loans into a single note in the sum of \$20,734. The officer then gave the undated note to Burwell for the purpose of obtaining defendants' signatures as guarantors. The note was to be dated when it was signed and the money was advanced, and interest was to accrue as of that date.

The back of the note contained an unconditional guaranty agreement which defendants signed. They do not dispute the validity of their signatures. They testified, however, that they had agreed with Burwell to be guarantors only for the previously unloaned amount of \$5,000. They both signed without seeing the front of the note.

Burwell testified that the note was blank when defendants signed it, and that he told the officer that defendants were to be liable only to the extent of \$5,000 pursuant to their agreement with him. The officer, who dealt exclusively with Burwell, denied any agreement limiting defendants' liability.

As noted, the court submitted a sole issue relative to defendants' liability: "What amount, if any, are the defendants . . . indebted to [the plaintiff]?" Defendants argue that the foregoing facts merited submission of their tendered issues as to (1) completion of the note in excess of the amount authorized, and (2) delivery conditioned on limitation of their liability to \$5,000.

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"Indebtedness" issues of the type submitted here may, in some circumstances, be inadequate to resolve controverted factual issues raised by the evidence. As stated in *Whitley v. Redden*, 276 N.C. 263, 266, 171 S.E. 2d 894, 897 (1970): "The often-used issue, 'How much, if anything, is plaintiff entitled to recover,' is not sufficient when other issues of fact are raised. This is true because submission of the single issue may omit controverted facts upon which the right to recover is based." See also *Yates v. Body Co.*, 258 N.C. 16, 21, 128 S.E. 2d 11, 14 (1962) (error to submit one indebtedness issue where recovery could be on express or implied contract).

Nevertheless, "[t]he number, form, and phraseology of issues is in the court's discretion; and there is no abuse of discretion where the issues are 'sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.'" *Pinner v. Southern Bell*, 60 N.C. App. 257, 263, 298 S.E. 2d 749, 753 (quoting *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E. 2d 505, 507 (1967)), *disc. rev. denied*, 308 N.C. 387, 302 S.E. 2d 253 (1983). "[T]he issue must be construed with respect to . . . the pleadings and the evidence and such part of the instructions . . . as may be pertinent to it." *Clinard v. Kernersville*, 217 N.C. 686, 688, 9 S.E. 2d 381, 382 (1940).

The two issues tendered by defendants are in reality one, *viz.*, was there a valid oral condition precedent limiting defendants' liability on the note to \$5,000? The true question is one of intent in the formation of the contract, which embraces both the alleged defense of unauthorized completion and that of conditional delivery.

The court instructed the jury with regard to defendants' liability as guarantors as follows:

On this issue the law is that if a person or persons sign a note as guarantor their liability is as set forth on the instrument, and in this instance it reads as follows:

"The undersigned jointly and severally guarantee the payment when due to any holder hereof of all amounts from time to time owing thereunder, and the payment upon demand of the entire amount owing on the foregoing agreement in the event of default in payment by the debtors named

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therein. Undersigned waives notice of acceptance of this guarantee and acknowledges themselves as fully bound by all the provisions in said agreement and expressly agree to pay all amounts owing hereunder upon demand without requiring any action or proceeding against the debtors.'

This means what it says. In plain language it means that a guarantor must pay the note by its terms without any action against the debtors, and that the guarantors jointly and severally are equally liable for the indebtedness along with the makers, Mr. and Mrs. Burwell, if the note is otherwise in proper form as to the Hambys.

On this issue the parties differ. The bank contends and has offered evidence that the note was completely filled out except for the date, which was to be inserted in the note upon its return to the bank so that the interest would start only upon delivery of the note to the bank; that the note had the guaranty printed on the back and upon receipt by the bank all signatures were affixed in the correct spaces where the checkmarks were placed, where the names were typed as to the makers and guarantors; that the bank had received a financial statement purporting to be that of the Hambys, and they were acceptable as guarantors.

On the other hand, the Hambys contend and have offered evidence that when Mr. Burwell received the note at the bank it was completely blank and that he took the note to Mr. and Mrs. Hamby, and they signed the note, and it was filled out by Mr. McCallister in the amount of \$20,734. And Mr. Burwell told Mr. McCallister that the guarantee was only for \$5,000 and it should be limited to that as far as the Hambys were concerned.

As to this contention the law reads as follows:

General Statute 25-3-115 relates to the incomplete instrument. 'When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect, it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.'

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Section 2. 'If the completion is unauthorized, the rule as to material alteration applies even though the paper was not delivered by the maker or the drawer, but the burden of establishing any completion is unauthorized is on the party so asserting.'

A note in the amount of \$20,734 is a material alteration when it is intended to be a guarantee for \$5,000, and such fact is communicated to the holder of the note who completes the blank and does not draw it as authorized. The drawing of the note other than [a]s authorized will discharge the guarantor and would be unenforceable.

As to this issue, if the plaintiff bank has satisfied you from the evidence and by its greater weight that the note in question was completely filled out except for the date, and that it was presented to Mr. and Mrs. Hamby by Mr. Burwell, and they signed it as guarantors, and you further find that the bank had demanded payment and that the Hambys had not paid the note in accordance with its terms, then in that event it would be your duty to answer this issue in the amount of \$21,672.75. The same as the answer to the first issue [regarding liability of the makers]. If the bank has not so satisfied you, it would be your duty to answer this issue nothing.

On the other hand if the Hambys have satisfied you from the evidence and by its greater weight that they signed a blank note on the back as guarantors, and intended to be guarantors only for the sum of \$5,000 and this information was communicated to the loan officer of the bank and notwithstanding the loan officer completed the note for \$20,734, and did not limit the guarantee as authorized, such failure to so limit the guarantee would discharge the guarantors, and you would answer this issue nothing.

In light of these instructions, we find the issue submitted sufficient to "resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Pinner, supra*. Nothing in the record indicates that the issue in any way confused the jury. See *Link v. Link*, 278 N.C. 181, 196, 179 S.E. 2d 697, 706 (1971); *Nagle v. Bosworth*, 248 N.C. 93, 95, 102 S.E. 2d 447, 448-49 (1958). On the contrary, the fact that the jury inter-

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rupted its deliberations to ask the court specifically about G.S. 25-3-115, the statute on unauthorized completion with regard to which the court had instructed, demonstrates affirmatively that it actively considered and rejected the defense asserted by defendants. Without that defense, defendants, as guarantors, were bound by the terms of the note. G.S. 25-3-307(2), 25-3-416. *See generally Advertising, Inc. v. Peace*, 43 N.C. App. 534, 259 S.E. 2d 359 (1979), *disc. rev. denied*, 299 N.C. 328, 265 S.E. 2d 393 (1980).

Construing the issue as required, then, with respect to the pleadings, the evidence, and the charge, *Clinard, supra*, we find no abuse of discretion in submitting the issue presented and refusing to submit those tendered by defendants.

Defendants also contend the court erred in failing to instruct on their defense that the note was delivered subject to a \$5,000 limitation on their liability. The instructions quoted above fully informed the jury regarding what it had to find in order to answer the issue submitted in favor of defendants. We thus find no error in the omission complained of.

No error.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. MASON ALEXANDER KNIGHT

No. 832SC438

(Filed 20 December 1983)

Criminal Law § 62—polygraph test—results improperly admitted into evidence

In a prosecution for burning a dwelling house in violation of G.S. 14-65 and for making a false claim in order to procure insurance proceeds in violation of G.S. 14-214, pursuant to *State v. Grier*, 307 N.C. 628 (1983), the trial court erred in admitting the results of a polygraph test even though both parties stipulated that the results could be admitted. Although the rule stated in *Grier* was to be effective in all cases from that date forward, there is no compelling reason for denying the aid of the rule announced in *Grier* to the defendant in this case. Further, since defendant strongly denied that he set the fire, and testified that he gave incriminating statements only because he was led to believe that by doing so, the investigation of the fire would be terminated, the admission of the test results could have unduly influenced the

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jury's assessment of defendant's credibility at trial and the admission was prejudicial.

APPEAL by defendant from *Watts, Judge*. Judgment entered 23 September 1982 in MARTIN County Superior Court. Heard in the Court of Appeals 2 December 1983.

Defendant was indicted for willfully and wantonly burning a dwelling house in violation of G.S. § 14-65, and for making a false claim in order to procure insurance proceeds in violation of G.S. § 14-214. He pleaded innocent but was found guilty by a jury.

The evidence tended to show that the house owned and occupied by defendant caught fire on 27 November 1981. No one was home when the Robersonville Fire Department arrived and put out the fire. An investigation revealed that the fire started at four separate points in a bedroom, with no evidence of an electrical or other accidental cause of the fire.

On 15 December 1981 Agent Brinkley of the State Bureau of Investigation (hereinafter, S.B.I.) went to defendant's place of employment and asked defendant to take a polygraph examination. Defendant agreed to go with Agent Brinkley to an S.B.I. office for the polygraph examination. Once there, Agent Godley explained the nature and purpose of the polygraph test to defendant. He also informed defendant of his right to remain silent, his right to an attorney, and the other warnings specified in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). Agent Godley then advised defendant not to take the polygraph test if he had been involved in the fire, but to take it if he had not been involved.

Defendant stated that he did not want to take the test. He then admitted starting the fire by throwing a lighted cigarette into some papers in the bedroom and leaving. Defendant was again advised of his *Miranda* rights. He executed a written confession to the effect that he had started the fire, and executed a written waiver of his right to remain silent and right to have an attorney present. At that point, defendant was arrested.

Defendant later obtained legal counsel and decided to take the polygraph examination. He stipulated that the results would be admissible as evidence of his credibility. The results indicated

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that defendant's denial of involvement with the fire was not truthful.

Defendant's motion *in limine* and motion to suppress the polygraph results and his inculpatory statements were denied. The S.B.I. polygraph examiner testified at trial about the test results. Defendant testified that his confessions were not made freely and voluntarily, and that he did not start the fire.

From judgment on the verdicts of guilty, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Brandon and Cannon, by Glen E. Cannon, for defendant.

WELLS, Judge.

Defendant contends that the trial court erred in admitting evidence concerning the results of the polygraph test. At the time of defendant's trial, polygraph results were admissible into evidence only when both parties stipulated that they could be admitted. The North Carolina Supreme Court has more recently decided that polygraph evidence is not admissible in any trial, even if the parties stipulate to its admission. *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983). Based on the analysis in *Grier*, we hold that admission of polygraph evidence in the present case constituted reversible error.

The court in *Grier* stated, "we have never retreated from our basic position that polygraph evidence is inherently unreliable." *Id.* at 642. The court then reasoned that a stipulation as to admissibility did nothing to enhance the reliability of polygraph results. *Id.* Accordingly, *Grier* held that polygraph evidence could not be admitted under any circumstances.

The *Grier* court announced that the rule barring polygraph evidence from trial would be effective in all cases from that date forward. Although *Grier* implied that the ruling was prospective only, the court did not discuss the issue of retroactive application of the rule barring polygraph evidence. In *Cox v. Haworth*, 304 N.C. 571, 284 S.E. 2d 322 (1981), the court discussed at length the policy implications inherent in giving retrospective effect to a decision overruling existing case law, and then expressed the general rule as follows:

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By overruling a prior decision, a court implicitly recognizes that the old rule has lost its viability and should no longer be the law. Unless compelling reasons . . . exist for limiting the application of the new rule to future cases, we think that the overruling decision should be given retrospective effect.

Defendant in the present case was tried seven months after the *Grier* trial. The defendant in *Grier* was given a new trial because inherently unreliable polygraph evidence was used against him. Defendant in the present case having been convicted with the aid of inherently unreliable polygraph evidence, we conclude that the fair and equal administration of justice requires that defendant be given the benefit of the reasoning in *Grier*. We find no compelling reason for denying the aid of the rule announced in *Grier* to the defendant in this case.

Defendant also contends the trial court erred in failing to suppress the inculpatory statements he made on 15 December 1981. The trial court made findings that defendant was advised of his *Miranda* rights, that he waived the rights to remain silent and to have an attorney present, and that defendant made his statements freely and voluntarily, with a full understanding of his rights. Competent evidence in the record supports these findings. Trial court findings following a *voir dire* hearing on the voluntariness of a confession are conclusive on appeal if supported by competent evidence. *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981). The findings support the trial court's conclusions of law that defendant's constitutional rights were not violated when he made his statements. Consequently, there is no error in that part of the trial court order which denied the motion to suppress defendant's inculpatory statements.

The state contends that in the light of defendant's two incriminating statements to the effect that defendant deliberately started the fire, the admission of the polygraph evidence could not have been prejudicial. We disagree. At trial, defendant strongly denied that he set the fire, and testified that he gave the incriminating statements only because he was led to believe that by so doing, the investigation of the fire would be terminated. Under such circumstances, the results of the polygraph test, i.e., that defendant's test responses were not truthful, could have un-

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duly influenced the jury's assessment of defendant's credibility at trial, *Grier, supra*.

New trial.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. CORNELIUS SQUALLS, JR.

No. 8212SC1237

(Filed 20 December 1983)

1. Burglary and Unlawful Breakings § 5.2— burglary in second degree—evidence of "nighttime" sufficient

In a prosecution for second degree burglary, the evidence was sufficient to show that the breaking and entry occurred in the nighttime where it tended to show that after 9:00 o'clock at night in January, defendant was in the process of loading his car with a television set stolen from the house, and where defendant's own testimony was that he was attracted to the scene by the house's lights.

2. Burglary and Unlawful Breakings § 7— second degree burglary—failure to instruct on lesser included offenses proper

In a prosecution for second degree burglary, the trial judge properly failed to instruct on the lesser included offenses of felonious breaking and entering and misdemeanor breaking and entering since no basis existed for a lesser included offense charge, and since pursuant to Rule 10(b)(2) of the Rules of Appellate Procedure, defendant waived his right to such instructions by answering negatively when the court twice asked defense counsel if any further instructions were requested.

APPEAL by defendant from *Brannon, Judge*. Judgment entered 30 June 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 19 September 1983.

After trial, defendant, indicted for burglary in the second degree and felonious larceny, was found guilty as charged.

The evidence tended to show that: About 7:45 o'clock Wednesday morning, January 27, 1982, Mr. Thomas J. Bradshaw, Jr. locked all the doors to his home in Fayetteville and left for work, and when he returned home that night about 9:20 o'clock, the lights were on, a strange car was backed up to his garage,

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and an object three or four feet wide and high, covered with a blanket, was in the front yard. Bradshaw tried to block the driveway with his car, but the other car suddenly drove across the front yard into the street, and Bradshaw followed in his car until the other vehicle wrecked, over eight miles away. A man jumped from the passenger side of the wrecked car and fled, but before the defendant driver could get away, Bradshaw trained his .357 Magnum on him and kept him there under surveillance until a deputy sheriff came. A portable television of Bradshaw's that was in his bedroom that morning was in the back seat of the wrecked car. Upon Bradshaw, the deputy sheriff, and the defendant going to Bradshaw's home, they found that the object under the blanket in the front yard was Bradshaw's other television set, which was in the den when he left home that morning. They also noted that the glass windowpane next to the doorknob of the door to the den had been broken out.

Defendant testified that: He was in the neighborhood looking for a friend, and upon seeing lights at the Bradshaw residence, drove up and knocked on the door; an unknown black male answered, told defendant he was in the process of taking a couple of television sets to his mother's house, and asked defendant to give him a ride; and when Bradshaw pulled into the driveway, the unknown male jumped into defendant's car, aimed a gun at him, and told him to drive, which he did until the car wrecked.

Attorney General Edmisten, by Associate Attorney General Charles H. Hobgood, for the State.

James R. Parish for defendant appellant.

PHILLIPS, Judge.

Defendant contends that his trial was erroneously prejudiced in two respects. Neither contention has merit, in our opinion.

[1] Defendant's first contention is that his motion to dismiss the charge of second degree burglary should have been granted because the evidence does not show that the breaking and entry occurred in the nighttime, a necessary element of the crime involved. G.S. 14-51. Though the evidence is silent as to just when the house was entered, it shows that after 9 o'clock at night in January defendant was in the process of loading his car with a

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television set stolen from the house. Since 9 o'clock at night in January in this longitude is two hours or more after darkness begins, that evidence justifies the inference that the breaking and entry also occurred during the dark of night. *State v. Tippet*, 270 N.C. 588, 155 S.E. 2d 269 (1967). It is not after the custom of thieves and burglars to do their depredations in leisurely installments or to tarry unnecessarily at the scene of their thievery; a speedy and stealthy accomplishment of their purpose and a hasty departure is more characteristic. Nothing in the evidence suggests that this bit of thievery was begun before darkness set in; on the other hand, defendant's own testimony that he was attracted to the scene by the house's lights tends to show the crime was committed after dark.

[2] Defendant's other contention is that the trial judge erred in failing to instruct the jury on the lesser included offenses of felonious breaking and entering and misdemeanor breaking and entering. First of all the record shows that: (a) In the jury instruction conference, defense counsel agreed in response to a direct inquiry from the court that there was no evidence that a lesser included offense had been committed; and (b) after charging the jury the court twice asked defendant's counsel if any further instructions were requested and received negative answers each time. Under Rule 10(b)(2) of the Rules of Appellate Procedure, any right that defendant might have had to a lesser included offense charge was thereby waived. *State v. Goodwin*, 59 N.C. App. 662, 297 S.E. 2d 623 (1982). Second, even if that was not the case, no basis existed for a lesser included offense charge. Lesser included offenses must be charged on only when the evidence, in one light at least, tends to show that one of the elements of the greater offense is missing and that a lesser included offense was therefore committed. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). The evidence in this case does not tend to show that a lesser included offense may have been committed. As has already been discussed there is no evidence that even suggests that this crime was not committed during the night, so that element of second degree burglary can be laid aside. And as to the other elements, the record contains no evidence which tends to show either that there was no break-in, or the place broken into was not a dwelling house, or it was not owned by Mr. Bradshaw, or there was no intention to commit a felony therein by stealing his television sets

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and other goods. The evidence the defendant claims supports this contention was his testimony to the effect that he had nothing to do with either the break-in or larceny, and was just trying to render assistance to what he thought was an honest stranger in need of help. That, of course, is not evidence that a lesser included offense was committed by defendant or anybody else—or that the offense of second degree burglary was not committed by somebody. It is evidence only that defendant committed no crime at all. Thus, it would have been inappropriate to permit the jury to find that some lesser included offense had been committed. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976).

The defendant was tried and convicted under the theory that he was acting in concert with the unnamed man who fled. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). If defendant was present only as a good Samaritan, he was entitled to have the jury acquit him—he was not entitled, though, to have them find him guilty of a lesser included offense.

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

CLAUDIA BARRINGTON AND MELVIN BARRINGTON, PARENTS OF DONALD H. BARRINGTON, DECEASED, EMPLOYEE, PLAINTIFFS v. EMPLOYMENT SECURITY COMMISSION AND/OR ECONOMIC IMPROVEMENT COUNCIL, EMPLOYER, UNITED STATES FIRE INSURANCE COMPANY AND/OR SEN-TRY INSURANCE, A MUTUAL COMPANY, CARRIER, DEFENDANTS

No. 8310IC23

(Filed 20 December 1983)

Appeal and Error § 68— law of the case

Where the Court of Appeals reversed and remanded an Industrial Commission decision, and the appellees petitioned for discretionary review in the Supreme Court at the same time that the appellees in *Godley v. County of Pitt* petitioned for discretionary review in the Supreme Court, where the *Godley* case and the present case presented the same basic legal issues for appellate review, where only the *Godley* case's petition for discretionary review was allowed, where the Supreme Court reached a result different from the result reached by the Court of Appeals in the present case, and where the Industrial Commission followed the instructions of the Court of Appeals upon re-

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mand on this case, the Court of Appeals was bound by the doctrine of the law of the case, and it was not appropriate for the Court of Appeals to consider what the Supreme Court said in the *Godley* decision and therefore must affirm the decision of the Industrial Commission. G.S. 7A-31.

APPEAL by defendants Economic Improvement Council and Sentry Insurance, A Mutual Company, from Order of North Carolina Industrial Commission entered 1 December 1982. Heard in the Court of Appeals 1 December 1983.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog by Richard T. Boyette for defendant appellants, Economic Improvement Council and Sentry Insurance, A Mutual Company.

Young, Moore, Henderson & Alvis by Edward B. Clark and B. T. Henderson, II, for defendant appellees, Employment Security Commission and United States Fire Insurance Company.

BRASWELL, Judge.

The sole question presented asks whether the result reached by the Industrial Commission is contrary to law as set forth in *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E. 2d 167 (1982). Having determined as a matter of law that we are bound by the doctrine of the law of the case, it is not appropriate for this Court to consider what the Supreme Court said in the above cited decision. Consequently, we affirm the decision of the Industrial Commission.

A brief history of events will serve to focus on why the law of the case applies. The Employment Security Commission (ESC), as contractor, engaged Economic Improvement Council (EIC), as subcontractor, to perform certain services in connection with a summer youth program under the federally funded Comprehensive Employment and Training Act (CETA). In the summer of 1978 Donald H. Barrington, decedent, was hired by ESC for the CETA summer youth program and was referred to EIC which placed him as a playground supervisor. Barrington died by drowning on 15 August 1978. Heretofore, the parties have stipulated that his death was the result of an accident arising out of and in the course of employment.

On 13 January 1981 the Industrial Commission entered its Opinion and Award in favor of Barrington. ESC and United

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States Fire Insurance Company appealed to this Court. On 2 February 1982 this Court, in 55 N.C. App. 638, 286 S.E. 2d 576, unanimously reversed and remanded for the reasons therein set out.

On 1 March 1982 EIC and Sentry, the present appellants, also petitioned the North Carolina Supreme Court for discretionary review pursuant to G.S. 7A-31. Discretionary review was denied on 4 May 1982, 305 N.C. 584, 292 S.E. 2d 569. In the interim the Industrial Commission had proceeded on the remand of 2 February 1982 decision and on 2 April 1982 filed a new Opinion and Award. When informed of the pendency of the petition of discretionary review, the Industrial Commission issued a stay of its 2 April 1982 order, and noted the time for appeal from its Opinion and Award. When informed that discretionary review had been denied, the Industrial Commission extended time for giving notice of appeal to this Court until 1 August 1982.

On 13 July 1982 our Supreme Court filed its opinion in *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E. 2d 167. On 21 July 1982 the present appellants filed in the Industrial Commission a motion for rehearing in light of the Supreme Court decision in *Godley*. On 29 July 1982 the Industrial Commission vacated and set aside its Opinion and Award of 2 April 1982, and set the case for reargument.

After the reargument on 14 September 1982 the Industrial Commission issued, on 1 December 1982, its Opinion and Award which is the final judgment from which appeal was made to this Court on 13 December 1982, with record on appeal docketed 7 January 1983.

When the parties were first before this Court, as reported in 55 N.C. App. 638, 286 S.E. 2d 576 (filed 2 February 1982), this Court had already decided *Godley*, 54 N.C. App. 324, 283 S.E. 2d 430, filed 20 October 1981, and *Godley* was cited in the first *Barrington* appeal. *Godley's* petition for discretionary review was allowed on 3 March 1982, 305 N.C. 299, 290 S.E. 2d 701. Thus, both of our court's cases, *Godley* and *Barrington*, were in the bosom of the Supreme Court at the same time. Both cases seem to us to have had the same basic legal issues presented for appellate review. Our Supreme Court saw fit to allow discretionary review in *Godley* while denying it for *Barrington*. Consequently,

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on remand of *Barrington* the Industrial Commission gave the appellants a rehearing, and issued a new judgment for its Opinion and Award.

We now quote two paragraphs from the Opinion and Award of the Industrial Commission of 1 December 1982.

The Full Commission has carefully considered the record in its entirety. The primary question for our determination is whether we are bound by the "law of the case" doctrine to follow the decision of the Court of Appeals on the former appeal in this case, notwithstanding the fact that the Supreme Court has decided the same matter differently in the interim.

[We are of the opinion that the Industrial Commission is bound by the "law of the case" doctrine to follow without variation or departure the mandate of the Court of Appeals in *Barrington v. Employment Security Commission, et al.*, 55 N.C. App. 638, --- S.E. 2d --- (1982),] rather than follow the more recent decision of the Supreme Court in *Godley v. County of Pitt, et al.*, 306 N.C. 357, --- S.E. 2d --- (1982). In accordance with the instructions of the Court of Appeals upon remand of this case, the Full Commission hereby makes the following

EXCEPTION NO. 1

The record on appeal shows that Assignment of Error No. 1 included Exception No. 1, and reads, "The Industrial Commission erred in its application of the 'law of the case' doctrine." However, in its brief this concession appears: "Appellants do not now contend that the Industrial Commission inappropriately applied the law of the case doctrine, and therefore abandon their Assignment of Error No. 1."

The present appeal presents nothing more than questions of law. The Supreme Court, in its own wisdom, having chosen to grant discretionary review and relief in *Godley* while denying it for *Barrington*, when both cases were pending before it at the same time, and when both cases involved almost identical points of law, ties our hands from considering the final law of *Godley* in this present case. The law of the case controls us. We have read the cases within the defendants' recently filed memorandum of

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additional authority, but remain firm in our resolve that under the present set of facts the law of the case must control.

Affirmed.

Judges HEDRICK and EAGLES concur.

MANNING P. COOKE, INDIVIDUALLY, AND MANNING P. COOKE, ADMINISTRATOR, C.T.A., D.B.N., OF THE ESTATE OF Q. H. COOKE v. TOWN OF RICH SQUARE

No. 826SC1331

(Filed 20 December 1983)

Limitation of Actions § 4.3; Municipal Corporations § 44— contract action against municipality—statute of limitations expiring

Plaintiff's action for breach of contract, unjust enrichment, and breach of a lease agreement against a municipality was barred by the statute of limitations where plaintiff's cause of action on the contract which involved repayment for monies loaned to the city for installation of a water and sewer system accrued in 1970 and payment under the agreement was not made, and where plaintiff did not initiate the action until 30 January 1980. G.S. 1-53(1).

APPEAL by plaintiff from *Strickland, Judge*. Judgment entered 15 September 1982 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 28 November 1983.

Manning P. Cooke, individually, filed a complaint on 30 January 1980 alleging as follows: (1) that his father, Dr. Q. H. Cooke, and a realtor, I. F. Rochelle, entered into an agreement dated 27 October 1953 with defendant regarding the installation of a water and sewer system in Cooke Circle in the town of Rich Square; (2) that pursuant to the agreement the cost of installing the system was to be paid by Dr. Cooke and Mr. Rochelle, and defendant was to reimburse them from the taxes and fees collected from residents of Cooke Circle; (3) that Dr. Cooke is now deceased and plaintiff Manning P. Cooke is the owner of a two-thirds interest in the purported contract; and (4) that defendant has refused to pay the amount due under the agreement, such amount being \$10,800, despite repeated demands to do so.

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Plaintiff set forth causes of action for breach of contract, unjust enrichment, and breach of a lease agreement. Defendant filed an answer denying the allegations of the complaint and raising several defenses including that the action was barred by the statute of limitations.

At the close of plaintiff's evidence at trial, defendant made a motion to dismiss which the court allowed only as to plaintiff's cause of action for unjust enrichment. Defendant rested without offering evidence and renewed its motion for a directed verdict as to the remaining causes of action which motion was granted. From the judgment entered allowing defendant's motion for a directed verdict, plaintiff appealed.

Cherry, Cherry, Flythe and Overton, by Joseph J. Flythe and Thomas L. Cherry, for plaintiff appellant.

Perry W. Martin and Taylor and McLean, by Donnie R. Taylor, for defendant appellee.

HILL, Judge.

Plaintiff contends the court erred in directing a verdict for defendant on the causes of action for breach of contract and unjust enrichment. In considering a motion for directed verdict, the court must view the evidence in the light most favorable to the non-moving party, giving to the non-movant the benefit of all reasonable inferences to be drawn in his favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). The court may grant the motion only if, as a matter of law, the evidence is insufficient to support a verdict for the non-movant. *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972).

We believe G.S. 1-53(1) controls the disposition of this case. G.S. 1-53(1) provides:

All claims against counties, cities and towns of this State shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon

. . . .

Plaintiff alleged that the agreement in question provided that the defendant town was to repay Dr. Cooke and Mr. Rochelle from

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the taxes and fees collected from the residents of Cooke Circle once ten houses had been built in that area. The evidence shows that the water and sewer system was completed in 1954 and that ten houses had been built in Cooke Circle by 1970. According to the town's records, no payments under the agreement were ever made by the defendant town to Dr. Cooke or his estate, Mr. Rochelle, or Manning P. Cooke, and the town had been receiving water and sewer fees from the residents of Cooke Circle as long as there had been any residents there. Between 1970 and 1980, defendant collected \$37,159.85 from property owners in Cooke Circle for taxes, water and sewer assessments.

Plaintiff's cause of action on the contract accrued and the statute of limitations began to run when the tenth house was built in Cooke Circle in 1970 and payment under the agreement was not made. Plaintiff did not initiate this action until 30 January 1980. Plaintiff failed to present his claim within the two year statute of limitations prescribed by G.S. 1-53(1); therefore, his claim is barred. It is well settled that a court has no discretion when considering whether a claim is barred by the statute of limitations. See *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E. 2d 870, *cert. denied*, 277 N.C. 110 (1970). In *Shearin v. Lloyd*, 246 N.C. 363, 370, 98 S.E. 2d 508, 514 (1957), the Court stated: "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all."

We hold the trial court properly directed a verdict for defendant.

Affirmed.

Judges WHICHARD and BECTON concur.

Clark v. Moore

ROY LEE CLARK v. WILLIAM MOORE, ROGER C. MOORE OIL CO., INC.

No. 826SC1306

(Filed 20 December 1983)

1. Automobiles and Other Vehicles § 55; Negligence § 29.1— leaving disabled truck in lane of traffic without warning signal—sufficiency of evidence of negligence

Plaintiff's evidence was ample to show that defendants were negligent *per se* in leaving a disabled truck in a lane of traffic, unattended and without warning signals, in violation of G.S. 20-161(c).

2. Automobiles and Other Vehicles § 88— driving with blinding sun in face—not contributory negligence as a matter of law

In a personal injury action where plaintiff drove his pickup truck into the rear of an oil company truck which had been abandoned on the road, the jury could reasonably infer from plaintiff's evidence that he was driving with the blinding sun in his face; that plaintiff was exercising the ordinary care required of a reasonably prudent person who finds himself driving with the blinding sunlight in his face.

APPEAL by defendants from *Strickland, Judge*. Judgment entered 4 October 1982 in Superior Court, HALIFAX County. Heard in the Court of Appeals 28 October 1983.

This personal injury action was filed as a result of a collision on 16 November 1977, when plaintiff's 1973 Datsun pickup truck ran into the rear of Moore Oil Company's delivery truck, which had been abandoned by defendant William Moore on Rural Paved Road Number 1357 in Warren County, North Carolina. Plaintiff alleged that defendants were negligent in leaving the oil truck unattended in a lane of travel of a highway without warning devices. Defendants denied any negligence on their part and pleaded plaintiff's contributory negligence as a defense.

At trial before a jury, plaintiff's evidence tended to show: that defendant's truck had been stopped in the eastbound lane of travel; that defendant William Moore had been operating defendant's truck; that at approximately 6:45 a.m., defendant William Moore left his disabled truck in the eastbound lane of traffic while he caught a ride to a service station; that defendant William Moore left the truck unattended, with no warning devices; that as plaintiff approached defendants' stopped vehicle, at approximately 7:00 a.m., the sun was shining in his face; that the

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speed limit was 55 miles per hour; that plaintiff was driving at a speed between 30 and 40 miles per hour; that plaintiff was driving for about 800 feet while blinded by the sun; that plaintiff drove that stretch of highway every morning; that plaintiff was in the shadow of the oil truck before he saw it and crashed into it; and that plaintiff's vehicle was damaged extensively and plaintiff suffered personal injuries.

Defendants put on no evidence and moved for directed verdict at the close of plaintiff's evidence and at the end of all the evidence. The trial judge denied the motions, and the jury found for plaintiff. The trial judge entered judgment for \$7,500.00 for plaintiff. Defendants' motion for judgment notwithstanding the verdict was denied. From the verdict and judgment, defendants appeal.

Hux, Livermon and Armstrong, by James S. Livermon, Jr., for plaintiff-appellees.

Battle, Winslow, Scott & Wiley, by Robert L. Spencer, for defendant-appellants.

EAGLES, Judge.

Defendants ask us to find that the trial judge erred in denying their motions for directed verdict and in denying their motion for judgment notwithstanding the verdict. Defendants contend that plaintiff's evidence as to defendants' negligence was not sufficient to submit the case to the jury and that plaintiff's own evidence showed contributory negligence as a matter of law. We do not agree with either contention.

Defendants' motion for directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure and defendants' motion for judgment notwithstanding the verdict under Rule 50(b) present the question whether, as a matter of law, the evidence is sufficient to entitle plaintiff to have the jury pass on it. In ruling on defendants' Rule 50 motions, the evidence must be considered in the light most favorable to the plaintiff, and he is entitled to all reasonable inferences that can be drawn from it. The court should deny motions for directed verdict and judgment notwithstanding the verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements.

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Hunt v. Montgomery Ward and Co., 49 N.C. App. 642, 272 S.E. 2d 357 (1980).

[1] Plaintiff presented ample evidence to show that defendants were negligent per se in leaving a disabled truck in a lane of traffic, unattended and without warning signals. Plaintiff presented uncontradicted testimony that defendants' truck was abandoned on the highway without warning signals. G.S. 20-161(c) provides:

The operator of any truck, trailer or semi-trailer which is disabled upon any portion of the highway shall display warning signals not less than 200 feet in the front and rear of the vehicle. During daylight hours, such warning signals shall consist of red flags.

Violation of G.S. 20-161 is negligence per se, but whether such violation is the proximate cause of plaintiff's injuries is a question for the jury. *Wilson v. Miller*, 20 N.C. App. 156, 201 S.E. 2d 55 (1973). Accordingly, defendants' motions for directed verdict and judgment notwithstanding the verdict were properly denied as to the negligence issue.

[2] Defendants also contend that plaintiff's evidence showed contributory negligence by plaintiff as a matter of law. Directed verdict or judgment notwithstanding the verdict on the grounds of contributory negligence should be granted only when the evidence establishes plaintiff's negligence so clearly that no other reasonable inference can be drawn from the evidence. *Daughtry v. Turnage*, 295 N.C. 543, 246 S.E. 2d 788 (1978); *Burrow v. Jones*, 51 N.C. App. 549, 277 S.E. 2d 97 (1981). While contributory negligence on the part of plaintiff could be inferred in that he continued driving with the blinding sun in his face, that is not the only reasonable inference to be drawn from the evidence. The jury could, and apparently did, infer that plaintiff was exercising the ordinary care required of a reasonably prudent person who finds himself driving with blinding sunlight in his face. Because plaintiff was entitled to all reasonable inferences in his favor that could be drawn from the evidence, defendants' Rule 50 motions as to the issue of contributory negligence were also properly denied.

Affirmed.

Judges WEBB and PHILLIPS concur.

State v. Maynard

STATE OF NORTH CAROLINA v. ANSON A. MAYNARD

No. 8312SC412

(Filed 20 December 1983)

1. Criminal Law § 10.2— accessory before the fact—sufficiency of evidence that not constructively present at crime scene

In a prosecution for accessory before the fact of felonious larceny, the trial court properly found that defendant was not constructively present at the larceny where defendant was miles away from the scene of the crime and in no position to assist the actual perpetrators.

2. Receiving Stolen Goods § 6— felonious possession of stolen goods—properly submitted as possible verdict

The trial court did not err when it submitted a possible verdict for felonious possession of stolen goods in addition to a possible verdict of accessory before the fact of felonious larceny since the evidence presented to the jury supported each element of the felonious possession offense. G.S. 14-71.1.

3. Criminal Law § 10; Receiving Stolen Goods § 7— sentence for accessory before the fact of larceny and possession of stolen goods improper

A defendant may not be punished for both accessory before the fact of larceny and possession of the stolen goods. G.S. 14-5.2.

APPEAL by defendant from *Hobgood, Judge*. Judgment entered 18 May 1982 in HOKE County Superior Court. Heard in the Court of Appeals 30 November 1983.

Defendant was convicted of being an accessory before the fact of felonious larceny, in violation of former G.S. 14-5, and of felonious possession of stolen goods, in violation of G.S. 14-71.1. The State's evidence tended to show that defendant encouraged Steven Henry and Jerry Wayne Scott to steal a motorboat on 5 February 1981. Defendant pointed out to Henry and Scott where the boat was kept and then he returned to the trailer where Scott and Henry lived. Defendant remained at the trailer while Scott and Henry borrowed his truck in order to steal the boat. About an hour and a half later, Scott and Henry came back with the stolen boat. Defendant put some equipment from the boat in his house and then, along with Scott and Henry, delivered the boat to a man who agreed to pay defendant \$1,500.00 for it.

Defendant did not present any evidence.

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Attorney General Rufus L. Edmisten, by Assistant Attorney General Francis W. Crawley, for the State.

Michael Smith for the defendant appellant.

VAUGHN, Chief Judge.

Defendant has expressly abandoned all the exceptions and assignments of error set forth in the record. Under Appellate Rule 10(a), none of the questions he presents on appeal are properly before this Court. We address the merits of defendant's appeal in the exercise of our discretion.

[1] Defendant first contends the trial court erred in submitting to the jury the possible verdict of guilty of accessory before the fact to felonious larceny. Defendant argues that he was constructively present at the larceny since he provided the truck for Scott and Henry to use in stealing the boat, and since he helped transport the boat to a buyer after the theft. If defendant was constructively present when the crime was committed, he could have been convicted as a principal but not as an accessory before the fact. *State v. Small*, 301 N.C. 407, 412-13, 272 S.E. 2d 128, 132 (1980). Constructive presence occurs when the defendant accompanies the actual perpetrator to the vicinity of the crime and stays there with the purpose of aiding the actual perpetrator, if needed, in committing the offense or escaping thereafter. *State v. Wiggins*, 16 N.C. App. 527, 530-31, 192 S.E. 2d 680, 683 (1972). (Citations omitted.)

In the present case, defendant was miles away from the scene of the crime and in no position to assist Henry and Scott during the theft. Consequently he was not constructively present, and therefore not a principal, when the crime was committed. The trial court properly submitted the accessory before the fact verdict to the jury.

[2] Defendant next contends the trial court erred in submitting felonious possession of stolen goods as a possible verdict. Defendant cites *State v. Perry*, 305 N.C. 225, 235-36, 287 S.E. 2d 810, 816 (1982), to the effect that G.S. 14-71.1, the statute concerned with possession of stolen goods, was designed to extend society's protection against theft by allowing prosecution where the State could not prove who committed the larceny and could not prove

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the elements of receiving stolen goods. He argues that since the evidence established who committed the larceny, he could not be charged with possession. *Perry* does not so hold, and the argument is without merit. The trial court did not err when it submitted a possible verdict for felonious possession since evidence was presented to the jury supporting each element of that crime. Although *State v. Perry, supra*, states that possession is a charge for the State to fall back on when lacking evidence of other offenses, it also holds that a defendant may be indicted and tried for larceny, receiving, and possession of the same property as long as he is punished for only one of those offenses. *Id.* at 236-37.

[3] Defendant further contends that he should not have been sentenced for both accessory before the fact of larceny and possession of stolen goods. We agree. *State v. Perry, supra*, at 235-237, concluded that the legislature did not intend that a defendant be punished for both larceny and possession of the same property. The same logic compels us to hold that a defendant may not be punished for both accessory before the fact of larceny and possession. If defendant had accompanied the others when they went to steal the boat, he would have been guilty of larceny as a principal and, under *Perry*, could not have been punished for both larceny and possession. It would be strange to say that although he took possession of the boat shortly after it was stolen, he could be punished twice merely because he did not accompany the thieves.

We note that G.S. 14-5.2 (effective 1 July 1981) now provides that anyone guilty and punishable as an accessory before the fact under former G.S. 14-5, 14-5.1 and 14-6 is now guilty and punishable as a principal to the crime. Since an accessory before the fact to larceny is now punished as a principal to larceny, and one who is punished as a principal to larceny may not also be punished for possession of the same property, the question we have just addressed is not likely to recur.

The judgments are vacated and the case is remanded for entry of judgment on one of the verdicts and dismissal of the other conviction.

Vacated and remanded.

Judges HILL and BECTON concur.

Forte v. Forte

KENNETH EUGENE FORTE v. NANCY BOGER FORTE

No. 8220DC1104

(Filed 20 December 1983)

Divorce and Alimony § 24.4— nonsupport of child—no contempt—willfulness element missing

In an action in which defendant sought the court to find plaintiff in contempt of court for nonsupport of his child pursuant to a support order, the trial judge's finding of fact that plaintiff stopped making payments, not in defiance of authority, but in a good faith reliance on defendant's agreement to support the child if he would waive his visitation rights, was supported by competent evidence, supported the conclusion that plaintiff's failure to comply with the order was not willful, and is conclusive on appeal.

APPEAL by defendant from *Huffman, Judge*. Order entered 12 June 1982 in District Court, STANLY County. Heard in the Court of Appeals 19 September 1983.

Under a separation agreement entered into in 1969, defendant was given custody of their minor child, then four years old, and plaintiff was accorded the right to visit the child only at the times mutually agreeable to the parties in defendant's home and upon at least twenty-four hours advance notice of the intended visit. In December, 1971, the parties were divorced, and at the same time a judgment was entered settling their various property claims and requiring plaintiff to pay \$75 a month toward the child's support.

The next activity in the case was a motion in the cause filed by the defendant March 2, 1982, alleging that plaintiff was more than \$9,000 in arrears in making the payments ordered and requesting that he be adjudged in contempt of court as a consequence. The plaintiff, answering the motion, admitted that he had not made the payments ordered for nearly ten years, but alleged that he was justified in doing so, because the defendant repeatedly refused to let him visit the child and agreed that if he would leave her and the child alone she would waive the support payments.

After hearing the evidence of the parties, upon findings and conclusions that plaintiff's failure to pay as directed was not willful, but was in "good faith reasonable reliance" upon defendant's oral agreement to waive the payments in exchange for plain-

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tiff foregoing his visitation rights, the trial court adjudged the plaintiff not to be in contempt. It was also adjudged that plaintiff is indebted to defendant in the amount of \$9,075 because of the missed payments and he was ordered to pay the remaining support installments as they became due.

Hopkins, Hopkins & Tucker, by William C. Tucker, for plaintiff appellee.

D. D. Smith and Henry C. Doby, Jr. for defendant appellant.

PHILLIPS, Judge.

The only question presented by defendant's appeal is whether the order deeming plaintiff not to be in contempt of court was erroneous. Since the evidence clearly indicates that plaintiff was able to make the payments ordered but chose not to do so, the defendant contends that we should remand the case to the trial court with instructions to find him in contempt of court. The law does not permit us to do that, however, for *wilfulness* is also a requisite of contempt, *Jones v. Jones*, 52 N.C. App. 104, 278 S.E. 2d 260 (1981), and the record does not establish that plaintiff's failure to comply with the order was wilful.

Wilfulness in matters of this kind involves more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law. *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966); *West v. West*, 199 N.C. 12, 153 S.E. 600 (1930). The trial judge's finding of fact that plaintiff stopped making payments, not in defiance of authority, but in a good faith reliance on defendant's agreement to support the child if he would waive his visitation rights, is supported by competent evidence, and is thus conclusive on us. *Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978). This finding supports His Honor's conclusion that plaintiff's failure to pay was not wilful and the determination that plaintiff was not in contempt. *Jarrell v. Jarrell*, 241 N.C. 73, 84 S.E. 2d 328 (1954). The order was also in accord with sound legal principles. Most jurisdictions in this country follow the just rule that disobedience to a court order that results from the advice or agreement of the complainant should not be punished at the complainant's behest. 17 C.J.S. *Contempt* § 39, p. 103 (1963). We know of no North Carolina decision to the contrary. The order appealed from is affirmed.

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Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. BOBBY GERALD PICKETT

No. 825SC1196

(Filed 20 December 1983)

Criminal Law § 122.2— judge's actions upon jury's inability to reach a verdict—proper

There was no error in the trial court ordering a jury back to the jury room for further deliberations after the foreman reported that the jury could not reach a verdict, and the judge had tentatively decided to declare a mistrial, hesitated and then decided to send the jury back for further deliberations.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 5 May 1982 in Superior Court, PENDER County. Heard in the Court of Appeals 31 August 1983.

Defendant was charged with armed robbery in violation of G.S. 14-87. He pleaded not guilty, and the jury returned a verdict of guilty of robbery with a firearm. The trial judge sentenced defendant to the presumptive term of fourteen years in prison and ordered him committed as a regular youthful offender.

Attorney General Edmisten, by Assistant Attorney General Steven F. Bryant, for the State.

Trawick & Pollock, by Harold L. Pollock, for defendant appellant.

PHILLIPS, Judge.

Defendant's only contention of error is based on the trial court ordering the jury back to the jury room for further deliberations after the foreman reported that the jury could not reach a verdict, and the judge had tentatively decided to declare a mistrial. The rule has been laid down in many of our decisions that a trial judge may have a deadlocked jury resume deliberations even though the jury does not feel it will be possible to

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reach a verdict, but, of course, in doing so the trial judge may not express an opinion as to the guilt or innocence of the defendant and may not imply that any juror should surrender his own free will and judgment. *State v. Long*, 58 N.C. App. 467, 294 S.E. 2d 4 (1982).

In the present case, the trial judge carefully instructed the jurors to decide the case according to their individual judgment. He warned them not to surrender their honest convictions for the mere purpose of returning a verdict. When the jury returned to the courtroom after three and one-half hours of deliberation, the following dialogue took place:

COURT: Now, members of the jury, I assume that you have not agreed on a verdict?

FOREMAN: We have not.

COURT: Does it look like there is any possibility of doing that?

FOREMAN: No possibility as I see it.

COURT: Let me ask this question: Don't tell me whether guilty or not guilty, but I want to know numerically how you stand, 8-4, 6-6, 10-2.

FOREMAN: Eight to four.

COURT: Has it been that way for awhile?

FOREMAN: Three votes.

COURT: Doesn't look like any possibility?

FOREMAN: No, sir.

COURT: All right. Withdraw juror number 12— Well, step up here a minute.

CONFERENCE AT BENCH:

COURT: Now, members of the jury, it is your duty to try to reconcile any differences that you have in order to reach a verdict. The main purpose of that is that it will be expense again to have to get another jury to try this case over. I am not saying this to try to coerce you in any way to reaching an agreement or cause someone to change any conviction they

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might have. It is your duty to try to reconcile any differences that you have and I will let you go back in there for a little while.

Nothing in this dialogue expresses an opinion on defendant's guilt or otherwise implies the jurors should surrender their independent judgment and defendant admits the language of the trial court was legally correct and not coercive.

The defendant argues, however, that the court's "actions" were indirectly coercive in that juror number 12 was ordered withdrawn, the trial court then hesitated, and then sent the jury with juror number 12 back for further deliberation. We do not so construe the court's action. We see no reasonable possibility of the jury or any member of it being coerced by the judge changing his mind about withdrawing juror number 12 and requiring them to deliberate further.

No error.

Chief Judge VAUGHN and Judge WHICHARD concur.

DOUGLAS R. BOLYNN, EMPLOYEE-PLAINTIFF v. GARLOCK PRECISION SEAL,
EMPLOYER, AETNA LIFE AND CASUALTY INSURANCE COMPANY,
CARRIER-DEFENDANTS

No. 8310IC22

(Filed 20 December 1983)

Master and Servant § 93.2— failure to provide plaintiff with copy of memorandum before hearing—no error

There was no violation of the Industrial Commission rules when plaintiff was not furnished with a copy of a memorandum, which a personnel supervisor used to refresh his recollection of a conversation he had had with plaintiff, prior to the hearing.

APPEAL by plaintiff-employee from opinion and award of the North Carolina Industrial Commission filed 16 August 1982. Heard in the Court of Appeals 1 December 1983.

Plaintiff filed this claim under the Workers' Compensation Act, claiming that he injured his back on 17 September 1980

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while performing his duties as a chrome plater for defendant, Garlock Precision Seal. The Industrial Commission found and concluded that "[p]laintiff did not sustain an injury to his back by accident arising out of and in the course of his employment with defendant employer."

From the decision of the Industrial Commission denying plaintiff any compensation he appealed.

Frank Patton Cooke, by R. C. Cloninger, for plaintiff, appellant.

Caudle, Underwood & Kinsey, P.A., by John H. Northey, III, and Thad A. Throneburg, for defendants, appellees.

HEDRICK, Judge.

The determinative question presented on this appeal is whether there was "any competent, admissible evidence in the record to support the Finding of Fact No. 2 of the hearing officer's opinion and award, which was subsequently adopted by the Industrial Commission." Finding of Fact No. 2 is as follows:

2. The credible evidence establishes that sometime prior to September 18, 1980, plaintiff injured his back away from work but he did not know how. His contention that he hurt his back when he lost his balance while lifting a heavy steel bar is not found to be credible in light of his statement to the personnel supervisor the following day that he had not hurt his back at work.

The evidence disclosed that the statement referred to in Finding of Fact No. 2 occurred on 18 September 1980 when plaintiff reported his injury to the personnel supervisor. The supervisor testified to this conversation with plaintiff without objection; on cross-examination he stated that before testifying he had refreshed his recollection of the conversation with a "memorandum" he had prepared. Plaintiff was not furnished with a copy of this memorandum prior to the hearing.

Plaintiff contends that his statement to the personnel supervisor, contained in Finding of Fact No. 2, was not competent evidence. He bases his contention on an alleged violation of Industrial Commission Rule XX(6), which in pertinent part provides:

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[A]ny claimant who shall give a written or recorded statement of the facts and circumstances surrounding his injury, shall, without request, be furnished a copy thereof immediately following a denial of liability or no less than ten (10) days prior to a pending hearing.

In our opinion the statement described in Finding of Fact No. 2 is not a "written or recorded statement" under Rule XX(6). The evidence indicates that the "statement" referred to in Finding of Fact No. 2 was an oral response to a question put by a superior in the course of a conversation about insurance coverage of chiropractic treatment. Plaintiff was not asked to sign or otherwise authenticate any notes made by the personnel supervisor in regard to this conversation, and the testimony of the personnel supervisor concerned his recollection of the conversation, rather than the "statement" he subsequently prepared. In short, the notes prepared by the personnel supervisor are qualitatively different from the formal investigatory statement contemplated by Rule XX(6). Even if we were to consider the memorandum in question a "statement" under the Rule, imposition of the sanction for violation of the Rule (exclusion of evidence of "designated matters") lies in the discretion of the Hearing Officer. In this case there is no indication that the Hearing Officer abused his discretion in permitting the person who prepared the memorandum to testify to his independent recollection of his conversation with plaintiff. We thus find that there was competent evidence to support this critical finding of fact. Our holding in this regard makes unnecessary a discussion of plaintiff's remaining assignments of error.

Affirmed.

Judges BRASWELL and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 20 DECEMBER 1983

ALLEN v. ALLEN No. 8326DC667	Mecklenburg (79CVD5869)	Affirmed
ASHE v. ASHE No. 8230DC1233	Jackson (80CVD216)	Vacated & Remanded
BRITTAIN v. KINLEY No. 8325DC5	Burke (82CVM141-A) (82CVD396)	Affirmed
CONNOR HOMES CORP. v. GRAHAM No. 8219SC1020	Montgomery (81CVS162)	Affirmed
EARLY v. DEMENT No. 8310SC69	Wake (80CVS5769)	Dismissed
FINGER v. CARTER No. 8323DC15	Yadkin (80CVD213)	Affirmed
MANUEL v. GATTIS No. 8315SC32	Orange (81CVS784)	No Error
MERRILL v. MERRILL No. 8310DC62	Wake (82CVD3637)	Affirmed
NICHOLSON v. NICHOLSON No. 836DC510	Halifax (82CVD164)	Affirmed
RAINES v. MOORE No. 8310DC686	Wake (82CVD6934)	Affirmed
RECTOR v. RECTOR No. 8228SC1342	Buncombe (82CVS244)	Affirmed
SELLERS v. PETERS No. 8327SC8	Gaston (81CVS1154)	Affirmed
SPERRY RAND CORP. v. ANDERS No. 8226DC1360	Mecklenburg (77CVD6084)	Affirmed
STATE v. ANDREWS No. 8318SC640 COUNTS FOSTER	Guilford (82CRS63465) Guilford (82CRS65607) Guilford (82CRS64401) (82CRS64402) (82CRS65624)	Dismissed

STATE v. RAYNOR, MAURICE No. 8318SC640 cont'	Guilford (82CRS53772) (82CRS53773) (82CRS62193) (82CRS62194)	Dismissed
RAYNOR, MILDRED	Guilford (82CRS64323) (82CRS64324)	
ROGERS, JEWEL	Guilford (82CRS48599) (82CRS48600) (82CRS48601) (82CRS64329)	
ROGERS, THOMAS	Guilford (82CRS48602) (82CRS48603) (82CRS48604) (82CRS62187) (82CRS62188) (82CRS64327) (82CRS64328)	
SAMS, DILLARD	Guilford (82CRS63464)	
SAMS, JAMES	Guilford (82CRS62189) (82CRS62190) (82CRS64325) (82CRS64326)	
SAMS, STEVE	Guilford (82CRS62191) (82CRS62192) (82CRS64321) (82CRS64322)	
SHELTON	Guilford (82CRS65668)	
STATE v. BARNES No. 835SC634	New Hanover (83CRS1530) (83CRS1531) (83CRS1532) (83CRS3077) (83CRS3184)	No Error
STATE v. BELLAMY No. 8315SC720	Chatham (81CRS3304)	No Error
STATE v. BLAKENEY No. 8322SC587	Iredell (82CR12950)	No Error
STATE v. CAGLE No. 8320SC645	Richmond (82CRS5627)	No Error

STATE v. CHARLES No. 8326SC749	Mecklenburg (82CRS6316)	No Error
STATE v. GIBBS No. 832SC620	Hyde (81CRS841)	No Error
STATE v. HALLMAN No. 8326SC448	Mecklenburg (82CRS64511)	No Error
STATE v. JONES No. 834SC449	Onslow (82CRS9564) (82CRS9565)	No Error
STATE v. JONES No. 8328SC758	Buncombe (82CRS0818) (82CRS0819)	New Trial
STATE v. KIRKMAN No. 838SC670	Wayne (82CRS9393A) (82CRS9394A)	No Error
STATE v. LANE No. 835SC745	New Hanover (83CRS2448) (83CRS2449) (83CRS2450) (83CRS2451) (83CRS2452) (83CRS2453) (83CRS2454) (83CRS2455) (83CRS3186)	Affirmed
STATE v. LEE No. 831SC712	Gates (82CRS132) (82CRS133)	No Error
STATE v. LOCKLEAR No. 8318SC501	Guilford (82CRS50115) (82CRS50114)	No Error
STATE v. MACCIA No. 8315SC388	Alamance (82CRS8473)	No Error
STATE v. MORRISON No. 8321SC619	Forsyth (82CRS26107)	No Error & Remanded
STATE v. ROBERSON No. 839SC664	Vance (80CRS7164)	No Error
STATE v. SMITH No. 8325SC124	Caldwell (82CRS842)	No Error
STATE v. SMITH No. 8326SC690	Mecklenburg (80CRS99936)	No Error

STATE v. TART
No. 8311SC472

Harnett
(83CRS6195)

No Error

STATE v. THRASH
No. 8312SC631

Cumberland
(82CRS26415)
(82CRS26420)

No Error

STATE v. WEST
No. 836SC659

Halifax
(82CRS12864)
(82CRS12867)
(83CRS2178)
(83CRS2363)

No Error

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ANNIE ROSE WILLOUGHBY v. KENNETH W. WILKINS, M.D., P.A., KENNETH W. WILKINS, M.D., ASHTON T. GRIFFIN, M.D., ELISHA J. CAIN, M.D., WAYNE CO. MEMORIAL HOSPITAL, INC. AND WAYNE COUNTY

No. 828SC1190

(Filed 20 December 1983)

1. Physicians, Surgeons and Allied Professions § 11— directed verdict for emergency room physician improper—jury question as to whether physician-patient relationship existed

The trial court erred in granting a directed verdict for an emergency room physician at the close of plaintiff's evidence in a medical malpractice action on the ground that a physician-patient relationship did not exist. The fact that plaintiff presented evidence that defendant evaluated plaintiff's physical condition and rendered medical advice to her would allow, though not compel, a jury to conclude that defendant had accepted plaintiff as a patient and had undertaken to diagnose and treat her.

2. Hospitals § 3.3— liability of hospital for negligence of emergency room physician—employer-employee relationship—directed verdict for hospital and county improper

In a medical malpractice action, the trial court erred in granting directed verdicts in favor of defendants county and hospital on the basis that an emergency room doctor was not an agent of the hospital and that therefore any alleged negligence of defendant doctor could not be imputed to the hospital or the county. The jury could find from the evidence that there was an employer-employee relationship between defendants hospital and county, and defendant doctor, where the evidence tended to show that the contract between defendants hospital and county and defendant doctor provided that defendant doctor was to conduct and operate the emergency room of defendant hospital "in such a manner as to further the best interest of said hospital and to meet the approval of the hospital"; defendant doctor was to perform his duties in a "manner which will most effectively promote the best interest of the hospital in relation to individuals who present themselves to the emergency room"; a specified number of days per year were available to defendant doctor as educational leave and vacation; defendant doctor's work schedule in the emergency room was subject to hospital approval; defendant doctor was required to make available prompt emergency treatment to persons who came to the hospital in need of such treatment, "irregardless of their ability to pay"; defendant doctor would not maintain a private practice; and defendant doctor was required to keep adequate medical records to be filed with the hospital.

3. Physicians, Surgeons and Allied Professions § 15— evidence of defendant doctor's prior psychiatric treatment—discovery concerning improperly denied in plaintiff's case against defendant hospital

In a medical malpractice action, the trial court properly denied the plaintiff's discovery motion concerning defendant doctor's prior psychiatric treatment in regard to plaintiff's case against defendant doctor; however, discovery

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of defendant doctor's prior psychiatric treatment should have been granted in plaintiff's case against defendant hospital since plaintiff's complaint alleges that defendant hospital was negligent in hiring and permitting defendant doctor to practice medicine in its emergency room.

4. Physicians, Surgeons and Allied Professions § 15— cross-examination of medical expert concerning prior medical negligence claims against expert improperly denied

The trial judge erred in preventing cross-examination of one defendant's expert witness concerning prior medical malpractice claims brought against the expert witness since such testimony is admissible to show bias or interest on the part of the expert.

5. Rules of Civil Procedure § 26— failure to properly respond to request for discovery—reversal of judgments for two defendants

The judgments entered against two defendant doctors must be reversed for failure to respond to a request for discovery pursuant to Rule 26(e)(1)(ii) where the facts indicated that plaintiff's complaint was filed September of 1979; in December of 1980, the plaintiff filed interrogatories to the defendants requesting certain information as to any expert witnesses each defendant intended to use; both defendants' answers filed in March 1981 and February 1981 indicated that no determination had been made at that time as to who would be the defendants' expert witnesses; that in response to further interrogatories, defendants in February 1982 and December 1981 both indicated that they had fully and appropriately supplemented their response to the earlier interrogatories; that on March 9, 1982 an order by the senior resident superior court judge was filed setting the case peremptorily for trial on 24 May 1982; during April of 1982 plaintiff deposed defendants and defendants deposed plaintiff's expert; that on 14 April 1982, plaintiff filed motions to compel discovery against defendants again requesting a list of defendants' expert witnesses; that at the hearing on this motion, held 21 April 1982, the attorneys for defendants asserted that no determination had been made as to the experts they would present at trial; on 5 May 1982, two and one-half weeks before the trial date, plaintiff filed another motion to compel discovery, asking that defendants not be permitted to call as witnesses experts whose identity was not disclosed on or before 14 May 1982; before the hearing was held on this motion, one defendant filed supplemental answers to plaintiff's interrogatories, listing his expert witnesses on 13 May 1982 and the other defendant filed his supplemental answers, listing his expert witnesses, on 14 May 1982. When defendants' experts were finally deposed, their testimony revealed that they had been contacted by defendants' attorneys several months before and that the contact had been made prior to the time the defense attorneys asserted to the court that they had made no determination as to who their expert witnesses would be. Supplemental answers to interrogatories are not seasonable when the answers are made so close to the time of trial that the parties seeking discovery thereby are prevented from preparing adequately for trial, even with the exercise of due diligence, and the Court was unable to say that plaintiff here was not prejudiced by the inability to adequately prepare for cross-examination of defendants' expert witnesses. Where a case has been set for trial peremptorily, whether on the motion of one of the par-

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ties or on the motion of the senior resident judge or chief district court judge, the court may not properly refuse to intervene to compel discovery on a material feature of the case, such as the identity of expert witnesses in a medical negligence case.

APPEAL by plaintiff from *Llewellyn, Judge*. Judgment entered 4 June 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 29 September 1983.

Plaintiff brought this medical malpractice action to recover damages for her permanent deafness, permanent renal damage, disfiguring scars, the loss of her stillborn son, her inability to bear children in the future, and severe emotional and psychological damage. Plaintiff contends that the cause of these injuries was defendants' negligent failure to diagnose, care for and treat plaintiff.

In January of 1977, plaintiff was 24 years old, was generally healthy, and had normal hearing. She had a five-year-old daughter and was approximately six and one-half months pregnant with a second child. She was illiterate.

Plaintiff became sick on 14 January 1977, suffering with flu-like symptoms. She called defendant Wilkins, her obstetrician, on 17 January. Defendant Wilkins referred her to defendant Bennett, a family physician, who saw plaintiff on 18 January and prescribed medication for an upper respiratory infection. On 19 January, plaintiff was unable to urinate, and defendant Bennett prescribed a drug to control nausea and vomiting. On 20 January, defendant Wilkins cancelled plaintiff's regularly scheduled office appointment for obstetric care because of her illness. On 21 January, plaintiff's husband called defendant Bennett because plaintiff's condition had worsened and she had not urinated for several days. Defendant Bennett allegedly referred plaintiff to defendant Griffin, a family physician, because Bennett was on vacation. On 22 January, a Saturday, defendant Griffin told plaintiff's husband to bring her in on Monday.

Later on 22 January, plaintiff's husband became so concerned about his wife's worsening condition that he took her to the emergency room of defendant Wayne County Memorial Hospital. There, she saw defendant Cain, the hospital's emergency room physician, who checked plaintiff and told her husband that they

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could go home and that his wife and baby would be all right. On Sunday, 23 January, plaintiff's husband took her to defendant Griffin's office. Defendant Griffin examined plaintiff and prescribed penicillin.

On Monday, 24 January, plaintiff's husband took her to defendant Wilkins' office. Defendant Wilkins referred plaintiff to J. M. Hester, M.D., an internist, who admitted her that day to Wayne County Memorial Hospital. Plaintiff was transferred to the intensive care unit at Duke University Medical Center the next day, 25 January, with "acute respiratory distress, renal failure and abnormal liver enzymes." On 26 January, she delivered a stillborn baby boy. While at Duke, plaintiff was treated for abscesses around her kidneys. The abscesses and necessary treatment left permanent disfiguring scars. At Duke, plaintiff was treated with the antibiotic Gentamycin, the use of which carries the risk of nerve damage. As a result of this treatment, which was considered necessary by the physician at Duke, plaintiff is now completely and permanently deaf. Plaintiff was a patient at Duke until 26 April 1977.

Plaintiff filed this action on 11 September 1979 against Kenneth W. Wilkins, M.D.; the corporation of Kenneth W. Wilkins, M.D., P.A.; Ashton T. Griffin, M.D.; Elisha J. Cain, M.D.; Paul C. Bennett, M.D.; the corporation of Paul C. Bennett, M.D., P.A.; Wayne County Memorial Hospital; and Wayne County. On 3 November 1980, plaintiff took a voluntary dismissal against Bennett and his corporation. In December of 1980, plaintiff served defendants with interrogatories, which included requests for the lists of expert witnesses that defendants intended to use.

In March of 1982, the case was peremptorily set on the trial calendar for 24 May 1982. On 14 April 1982, plaintiff filed motions to compel, requesting that the court order defendants to answer certain interrogatories, especially those filed in December of 1980 concerning the identity of expert witnesses. On 21 April 1982, Judge Rouse denied these motions, based on defense counsel's assertions that they did not know the identity of their expert witnesses.

On 5 May 1982, plaintiff filed motions to produce, requesting (1) that the court order Wayne County Memorial Hospital to produce letters of reference received by the hospital concerning

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defendant Cain's psychiatric treatment before he was hired, and (2) that the court require defendants to list their expert medical witnesses and not allow the defense to call expert witnesses not listed on or before 14 May 1982. Prior to the hearing on these motions, defendant Wilkins filed his supplemental answers to interrogatories which listed his expert witnesses (on 13 May 1982); defendant Griffin responded, listing his expert witnesses, on 14 May 1982. On 18 May 1982, Judge Llewellyn granted plaintiff's motions to produce and ordered that all depositions of experts were to be completed on 24 May 1982, the day the trial was to begin. The hospital refused to produce the letters and filed a motion to vacate the order directing them to do so. When the case was called for trial, Judge Llewellyn ruled that this matter had already been ruled on by Judge Rouse and vacated the 18 May 1982 order to produce the letters of reference.

The trial commenced on 24 May 1982, and on 1 June 1982, at the close of plaintiff's evidence, the trial judge denied defendants' motions for directed verdicts as to defendants Wilkins, Cain, and Griffin. Defendants' motions for a directed verdict as to the hospital and the county were granted. On 2 June 1982, the trial judge stated that he had changed his mind and decided to grant defendant Cain's motion for a directed verdict. Plaintiff's motion to exclude defendants' expert testimony based on defendants' failure to seasonably supplement their answers to interrogatories concerning their expert witnesses was also denied at this time, and the trial continued against defendants Wilkins and Griffin. The jury rendered a verdict in favor of defendants Wilkins and Griffin, and the judgment was entered on 8 June 1982.

From this judgment and from the directed verdicts granted as to defendants Cain, hospital, and county, plaintiff appeals.

Michaels & Jernigan, by Leonard T. Jernigan, Jr., for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and Alene M. Mercer, for defendant-appellees Kenneth M. Wilkins, M.D., P.A., and Kenneth M. Wilkins, M.D.

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Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., and Jodee Sparkman King, for defendant-appellants Ashton T. Griffin, M.D., and Elisha J. Cain, M.D.

Yates & Fleishman, by Joseph W. Yates, III, and Beth R. Fleishman, for defendant-appellants Wayne County Memorial Hospital, Inc., and Wayne County.

EAGLES, Judge.

I.

[1] Plaintiff assigns as error the granting of defendant Cain's motion for a directed verdict at the close of plaintiff's evidence. Plaintiff contends that a directed verdict was improper because the evidence was sufficient to raise a jury issue as to whether a physician-patient relationship existed between defendant Cain and plaintiff. We agree.

A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure raises the question as to whether there is sufficient evidence to go to the jury. In considering a motion for a directed verdict, the trial judge must take all the evidence which supports plaintiff's claim as true, consider the evidence in the light most favorable to the plaintiff, and give the plaintiff the benefit of every reasonable inference in the plaintiff's favor which may be reasonably drawn. *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980). A directed verdict is improper unless it appears as a matter of law that plaintiff cannot recover under any view of the facts which the evidence reasonably tends to establish. If, on the evidence before the court, reasonable minds could differ as to whether plaintiff is entitled to recover, a directed verdict is improper and the case should go to the jury. *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982).

A physician-patient relationship between defendant Cain and plaintiff must be shown before any duty of care may be imputed to defendant Cain. "[T]he ultimate test of liability would depend upon whether the physician actually accepted [a] . . . person as a patient and undertook to treat him." *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931). The question before us is whether, when the evidence is considered in the light most favorable to

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plaintiff, there was evidence from which a jury could find that defendant Cain accepted plaintiff as a patient and undertook to treat her. We find that there was evidence of a physician-patient relationship.

The evidence presented by the plaintiff shows that: On 22 January 1977, plaintiff's husband took plaintiff to the emergency room of Wayne County Memorial Hospital. There, a nurse took plaintiff's vital signs. According to plaintiff's husband's testimony, defendant Cain, who was on duty in the emergency room, introduced himself and personally checked plaintiff's ears, eyes, throat, and chest. Defendant Cain told plaintiff to see Dr. Bennett as soon as she could, to go home and go to bed, and to drink a lot of water. There was also contradictory evidence that defendant Cain did not accept plaintiff as a patient because she was not, according to hospital policy, an "acute emergency." Defendant Cain testified that when a patient was not an acute emergency, the physician wrote it up in a "rejection book." He explained that these non-emergency patients required him to:

Stop seeing the emergency patients that needed my care to go over there to the desk and hassle with these—no, excuse me, that—hassle with these, most of whom are crooks, didn't want to go to a private doctor because they would have to pay or they didn't want to have to get off from work and go to the doctor the next day. That was the type people we rejected, very undesirable people. . . .

Defendant Cain testified that plaintiff "was not an emergency. She had an illness which had been going on for five days and the vital signs were normal and she was under the care of a family doctor she could have reached that night."

We find that this evidence would allow a jury to find that a physician-patient relationship was established. We do not hold here that the act of "rejecting" a patient establishes a physician-patient relationship; rather, we hold that the fact that plaintiff presented evidence that defendant Cain evaluated plaintiff's physical condition and rendered medical advice to her would allow, though not compel, a jury to conclude that defendant Cain had accepted plaintiff as a patient and had undertaken to diagnose and treat her. Defendant Cain's testimony that he did not accept plaintiff as a patient directly contradicts plaintiff's

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evidence that he checked her over and gave her medical advice. This is, as our Supreme Court recently held in a case concerning the establishment of the physician-patient relationship, a situation where "[s]uch a contradiction raises an issue of material fact to be decided by the jury." *Easter v. Lexington Memorial Hospital*, 303 N.C. 303, 306, 278 S.E. 2d 253, 255 (1981). It was error to accept defendant Cain's statement that he did not accept plaintiff as a patient as a legal conclusion that a physician-patient relationship was not established. Because the evidence could show, when considered in the light most favorable to the plaintiff, that there was a physician-patient relationship, we hold that the motion for directed verdict was improperly granted as to defendant Cain. We therefore reverse the judgment of the trial court as to defendant Cain and remand for a new trial.

II.

[2] Plaintiff assigns as error the granting of directed verdicts in favor of defendants Wayne County and Wayne County Memorial Hospital. Defendant hospital argued that defendant Cain, an emergency room doctor, was not an agent of the hospital and that therefore any alleged negligence of defendant Cain could not be imputed to the hospital or the county. Since we have reversed the directed verdict as to defendant Cain, we must now consider whether the directed verdicts in favor of the hospital and the county were proper. Here too, we must consider the evidence in the light most favorable to the plaintiff in evaluating the propriety of the directed verdict for defendants hospital and county. *Tripp v. Pate, supra; Koonce v. May, supra.*

In North Carolina, a principal generally is liable for the negligent acts of his agent which result in injury to another. *King v. Motley*, 233 N.C. 42, 62 S.E. 2d 540 (1950). Generally, there is no vicarious liability upon an employer for negligent acts of an independent contractor. *Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 159 S.E. 2d 362 (1968). The test for determining whether a relationship between parties is that of principal and agent (employer and employee), or that of employer and independent contractor, is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing work. As distinguished from an agent or employee, an independent contractor is not subject to interference or control by

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the employer with respect to the manner or method of doing the work. *Little v. Poole*, 11 N.C. App. 597, 182 S.E. 2d 206 (1971).

The question here is whether, when considering the evidence in the light most favorable to the plaintiff, the trial court had before it evidence that defendant Cain was subject to interference or control by defendants hospital and county with respect to the manner or method of performing his duties as an emergency room physician. We find, as this court found in *Rucker v. High Point Memorial Hospital*, 20 N.C. App. 650, 202 S.E. 2d 610, *aff'd*, 285 N.C. 519, 206 S.E. 2d 196 (1974), that there was some evidence from which an employer-employee relationship could be found to exist between the hospital and defendant Cain. We hold that the trial court erred in directing a verdict against plaintiff in favor of defendants hospital and county.

In *Rucker*, defendant emergency room doctor stated that he was an independent contractor, but this court looked to the contract between defendant doctor and defendant hospital which was introduced into evidence to find evidence of an employer-employee relationship. The court found sufficient evidence of an employer-employee relationship to preclude a directed verdict for the hospital on the agency question by reliance, *inter alia*, on contract provisions that: defendant doctor was employed at a guaranteed salary; the emergency team was to see all patients coming to the emergency room; defendant doctor was to perform his emergency room services "in a manner as to further the best interest of the hospital including the best possible care and treatment of the patient with special emphasis on the maintenance of good public relations." There the contract provided for vacation, educational leave, and sick leave. The defendant doctor there agreed he would not carry on a private practice. *Rucker*, 20 N.C. App. at 660, 202 S.E. 2d at 617.

Here, the contract between defendants hospital and county and defendant Cain was introduced into evidence and showed that, *inter alia*: defendant Cain was to conduct and operate the emergency room of defendant hospital "in such a manner as to further the best interest of said hospital and to meet the approval of the Hospital"; defendant Cain was to perform his duties in a "manner which will most effectively promote the best interest of the Hospital in relation to individuals who present themselves to

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the Emergency Room"; a specified number of days per year were available to defendant Cain as educational leave and vacation; defendant Cain's work schedule in the Emergency Room was subject to hospital approval; defendant Cain was required to make available prompt emergency treatment to persons who came to the hospital in need of such treatment, "irregardless of their ability to pay"; defendant Cain would not maintain a private practice; and defendant Cain was required to keep adequate medical records to be filed with the hospital. Dr. Cain himself gave testimony that he did not make out a chart on plaintiff and that he wrote her up as a "reject" because of hospital policy. He stated: "I had nothing to do with those rules. They were in effect when I came up there." We hold that the provisions of the contract and the testimony of defendant Cain provide sufficient evidence to preclude a directed verdict for defendants on the agency question.

Defendants hospital and county argue that defendant Cain's testimony that he was an independent contractor and that he exercised his own judgment in respect to patient treatment, coupled with a contract provision declaring that defendant Cain would "be at all times acting and performing as independent contractor and not as employee of the Hospital," support the directed verdict. Defendants emphasize that the contract in *Rucker* did not expressly state that the doctor was an independent contractor, as defendant Cain's contract did. We are not persuaded by this distinction. There is abundant evidence in defendant Cain's contract to show that defendant hospital exercised significant control over defendant Cain's method of performing his duties. Our Supreme Court has said that even when a contract states that the relationship of principal and agent does not exist, "when the provisions of the contract make it a contract of agency, then it is a contract of agency, and it makes no difference by what names the parties call themselves." *Ford v. Willys-Overland*, 197 N.C. 147, 149, 147 S.E. 822, 823 (1929). This contract provision and defendant Cain's testimony to the effect that he was an independent contractor merely contradict plaintiff's other evidence that defendant Cain was an employee of defendants hospital and county. The contradiction raises an issue of material fact to be decided by the jury. *Easter, supra*.

Because the jury could find from the evidence that there was an employer-employee relationship between defendants hospital

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and county, and defendant Cain, we hold that the motions for directed verdict as to defendants hospital and county were improperly granted. We therefore reverse the judgment of the trial court as to defendant Wayne County Memorial Hospital and defendant Wayne County and remand for a new trial.

III.

Plaintiff assigns as error (1) the trial judge's sustaining of defendant's objections to the introduction of prior unrelated medical malpractice claims pending against defendant Cain and (2) the fact that the judge who ruled on discovery motions denied discovery as to defendant Cain's prior psychiatric treatment. We may not consider plaintiff's complaint that the trial judge improperly sustained defendant's objections to introduction of pending medical malpractice claims against defendant Cain. After careful review of the record, we find that a pre-trial motion to compel an admission regarding the malpractice claims was objected to by defendants and sustained, but we are unable to find any attempt by plaintiff to introduce such evidence at trial. In plaintiff's brief, plaintiff assigns as error the denial of the trial court to allow introduction of this evidence but fails to list exceptions on which this assignment is based. This court will not consider an argument based upon an issue not presented to or adjudicated by the trial tribunal, and the lack of an exception or assignment of error addressed to the issue attempted to be raised is a fatal defect. N.C. R. App. P. 10; *State v. Smith*, 50 N.C. App. 188, 272 S.E. 2d 621 (1980).

[3] As to the denial of discovery concerning defendant Cain's prior psychiatric treatment, we find no reversible error in regard to plaintiff's case against defendant Cain. Plaintiff's complaint alleges that defendant Cain was negligent in his treatment of the plaintiff. The discovery rules allow discovery "regarding any matter not privileged which is relevant to the subject matter involved. . . . It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. . . ." N.C. R. Civ. P. 26(b)(1). Under this rule, we find that the judge could have allowed the discovery, but we hold that he committed no reversible error in denying the discovery. Prior psychiatric treatment of defendant Cain has no relevance to this

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medical negligence action against defendant Cain, so discovery of this information would not lead to the discovery of admissible evidence against defendant Cain.

Nevertheless, discovery of defendant Cain's prior psychiatric treatment should have been granted in plaintiff's case against defendant hospital. Plaintiff's complaint alleges that defendant hospital was negligent in hiring and permitting defendant Cain to practice medicine in its emergency room. The judge disallowed discovery of defendant Cain's alleged prior psychiatric treatment, apparently based on the fact that this evidence was irrelevant and inadmissible against Cain. The fact that the evidence was irrelevant and inadmissible against Cain does not permit the court to deny discovery of information which may be relevant against defendant hospital. Defendant hospital's knowledge of defendant Cain's prior psychiatric treatment is discoverable where plaintiff charges defendant hospital with negligent hiring of defendant Cain. The information sought appears reasonably calculated to lead to the discovery of admissible evidence. N.C. R. Civ. P. 26. Prior to defendant hospital's new trial, discovery of information regarding defendant Cain's prior psychiatric treatment, if requested, must be allowed.

IV.

[4] Plaintiff assigns as error the trial court's failure to allow plaintiff to impeach defendants' medical experts by not allowing plaintiff to cross examine defendants' experts concerning prior medical negligence claims. We may not consider this argument in regard to defendant Griffin's medical expert, Dr. Cutchin, because plaintiff never asked the court to allow cross examination of Dr. Cutchin regarding a prior medical negligence claim. Because it was not presented to or adjudicated by the trial court, we make no findings as to cross examination of Dr. Cutchin. N.C. R. App. P. 10; *State v. Smith, supra*. As to the trial court's refusal to allow plaintiff to impeach defendant Wilkins' medical expert, Dr. Parker, by cross examining him on a prior medical negligence claim brought against him, we find that the trial judge improperly denied plaintiff's request to cross examine Dr. Parker in this manner.

Defendants argue that evidence that Dr. Parker had previously been sued for medical negligence was not relevant to

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plaintiff's negligence action against defendant Wilkins. We agree that this evidence is not relevant to the question of defendant Wilkins' negligence, but we hold that evidence of prior medical negligence claims brought against the expert witness is admissible to show bias or interest on the part of the expert. Cross examination is available to establish bias or interest as grounds of impeachment. 1 Brandis, N.C. Evidence § 42 (2d ed. 1982). Evidence of a witness' bias or interest is a circumstance that the jury may properly consider when determining the weight and credibility to give to a witness' testimony. 1 Brandis, N.C. Evidence § 45 (2d ed. 1982). We hold that the jury should be allowed to consider that an expert witness in a medical negligence case has previously been sued for medical negligence, for the jury could find that this would lead the expert witness to have a bias or interest. We note that if evidence to show bias is brought out on cross examination, the witness would be entitled to explain the evidence on redirect examination. *Id.* Of course, the trial judge retains the discretion to restrict and control the extent and scope of both cross examination and redirect examination. *Id.*, §§ 36 and 42.

The trial judge erred in preventing cross examination of defendant Wilkins' expert witness concerning prior medical malpractice claims brought against the expert witness. This action prevented the jury from hearing facts from which bias or interest on the part of the expert witness could be inferred. We therefore reverse the judgment of the trial court as to defendant Wilkins and remand for a new trial.

V.

[5] Plaintiff contends that the trial court improperly allowed the defendants' medical experts to testify because defendants had not complied with the requirements of Rule 26(e)(1)(ii) of the North Carolina Rules of Civil Procedure. Rule 26(e)(1)(ii) is addressed to parties who have responded to a request for discovery. It provides:

A party is under a duty seasonably to supplement his response with respect to any question directly addressed to . . . the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

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Plaintiff contends that defendants Wilkins and Griffin failed to seasonably supplement their responses to interrogatories requesting the list of their experts and that plaintiff was thereby prejudiced because of inadequate time to prepare to cross examine those expert witnesses at trial. We agree and reverse the judgments entered for defendants Wilkins and Griffin.

The complaint in this case was filed in September of 1979. In December of 1980, plaintiff filed interrogatories to defendants Wilkins and Griffin, requesting, *inter alia*, certain information as to any expert witnesses each defendant intended to use. Both Wilkins' answers (filed 17 March 1981) and Griffin's answers (filed 26 February 1981) indicated that no determination had been made at that time as to who would be defendants' expert witnesses. In response to further interrogatories, defendants Wilkins (on 23 February 1982) and Griffin (on 29 December 1981) both indicated that they had fully and appropriately supplemented their responses to the earlier interrogatories, i.e., they still had not identified and selected their expert witnesses.

On 9 March 1982, an order by the senior resident superior court judge was filed, setting the case peremptorily for trial on 24 May 1982. During April of 1982, plaintiff deposed defendants Wilkins and Griffin, and defendants deposed plaintiff's expert.

On 14 April 1982, plaintiff filed motions to compel discovery against defendants Wilkins and Griffin, again requesting lists of defendants' expert witnesses. At the hearing on this motion, held 21 April 1982, the attorneys for defendants Wilkins and Griffin again asserted that no determination had been made as to the experts they would present at trial. The presiding judge denied plaintiff's motion to compel, saying: "I will not require you to give names and addresses of witnesses that don't exist." This was four and a half weeks before the trial date.

On 5 May 1982, two and a half weeks before the trial date, plaintiff filed another motion to compel discovery, asking that defendants not be permitted to call as witnesses experts whose identity was not disclosed on or before 14 May 1982. Before the hearing was held on this motion, defendant Wilkins filed supplemental answers to plaintiff's interrogatories, listing his expert witnesses on 13 May 1982; defendant Griffin filed his supplemental answers, listing his expert witness, on 14 May 1982. On 18

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May 1982, six days before the peremptorily scheduled trial date, the trial judge granted plaintiff's motion to compel and ordered that all depositions of experts be completed by the day the trial would begin.

Plaintiff deposed two of defendant Wilkins' experts on 19 May 1982 (five days before the trial date), one of defendant Griffin's experts on 23 May 1982 (a Sunday, the day before the trial began), and one of defendant Wilkins' experts on 25 May 1982 (the evening of the second day of trial). Because of illness in the court reporter's family, plaintiff never received a complete transcript of the testimony of defendant Griffin's expert.

At the close of plaintiff's evidence on 1 June 1982, plaintiff moved to exclude testimony of defendants Wilkins' and Griffin's expert witnesses, and to bar the use at trial of their depositions, based on defendants' failure to seasonably supplement their answers to plaintiff's interrogatories concerning their expert witnesses. On 2 June 1982, the trial judge denied plaintiff's motion to exclude testimony of defendants' experts, noting that:

[T]he Court takes due notice of the wording of the Statute in regard to seasonably complying with answers to written interrogatories, and without any guidance from the Court of Appeals or the Supreme Court in regard to the definition of "seasonably" . . . specifically does not make any findings as to whether or not the availability of the expert witnesses was seasonably provided to the plaintiff.

Defendants Wilkins and Griffin then put on their evidence, and the jury rendered a verdict in favor of defendants.

Plaintiff contends that defendants purposefully concealed the identity of their experts and thereby abused the discovery process. Plaintiff bases this contention on the fact that when defendants' experts were finally deposed, their testimony revealed that they had been contacted by defendants' attorneys several months before and that the contacts had been made prior to the time the defense attorneys asserted to the court that they had made no determination as to who their expert witnesses would be. Defendants' attorneys argue strenuously that although they had indeed "contacted" several potential experts for the purposes of advising defendants' attorneys or reviewing testimony of plaintiff's expert,

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they had not made a decision as to whom they intended to call until May 13 (for Wilkins) and May 14 (for Griffin).

Plaintiff urges us to find that defendants conducted a "trial by ambush" and that last minute supplementation of interrogatories is not consistent with the spirit of the discovery rules. North Carolina Rule 26 is substantially the same as Federal Rule 26, and federal decisions interpreting this Rule of Civil Procedure are instructive. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Federal cases have held that testimony must be excluded when the party from whom discovery was requested failed to exercise reasonable diligence to give the party requesting discovery adequate information concerning witnesses or theories of the case and provided only last-minute responses to requests for discovery. To allow such practices would be unfair and constitutes prejudice to the party seeking discovery inasmuch as that party would be deprived of the right and ability to adequately prepare for cross examination or the right to obtain and present rebuttal evidence. *Kirksey v. City of Jackson, Miss.*, 506 F. Supp. 491, 497 (S.D. Miss. 1981); see also, *Shelak v. White Motor Co.*, 581 F. 2d 1155 (5th Cir. 1978) and *Davis v. Marathon Oil Co.*, 528 F. 2d 395 (6th Cir. 1975). This court has held that the emphasis of the discovery process must be "not on gamesmanship but on expeditious handling of factual information." *Carpenter v. Cooke*, 58 N.C. App. 381, 384, 293 S.E. 2d 630, 632 (1982) (quoting *Willis v. Power Co.*, 291 N.C. 19, 34, 229 S.E. 2d 191, 200 (1976)).

Plaintiff urges us to define the requirement for "seasonable" supplementation to answers to interrogatories with mathematical precision and to find that defendants' supplemental answers fell outside the acceptable limit. No North Carolina or federal court has established such a formula. We too decline to establish a hard and fast rule defining "seasonable" in this context. While we decline to state a mathematical formula to determine what is "seasonable," we find that supplemental answers to interrogatories are not seasonable when the answers are made so close to the time of trial that the party seeking discovery thereby is prevented from preparing adequately for trial, even with the exercise of due diligence.

Our attention here is focused on whether the discovery process for this trial afforded the plaintiff a fair opportunity to ac-

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comply with what the discovery rules are designed to accomplish. The goal of the discovery rules is to facilitate the disclosure, prior to trial, of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of basic issues and facts to go to trial. *Carpenter v. Cooke, supra*.

We find that the discovery process in this case did not function as it should have because the case was set peremptorily while discovery was not complete and the motion to compel discovery of the experts' names was denied thereafter. While the record is somewhat ambiguous, the peremptory setting was apparently on the senior resident judge's own motion, as allowed by Rule 2(f) of the General Rules of Practice for the Superior and District Courts. The philosophy of the General Rules of Practice is to "avoid technical delay and to permit just and prompt consideration and determination" of all business before the courts. Rule 1, General Rules of Practice for the Superior and District Courts. Of course, we have no quarrel with a senior resident judge having discretion to set a case peremptorily for "good and compelling reasons." That decision regarding case management properly rests in the sound discretion of the senior resident judge or chief district court judge. See, Rule 2, General Rules of Practice for the Superior and District Courts. We are troubled, though, when a major medical malpractice case has been peremptorily set for trial, but motions to compel discovery as to the identity of key expert witnesses are subsequently denied because the non-producing party asserts that it has not yet determined the identity of its expert witnesses.

We are unable to say that plaintiff here was not prejudiced by an inability to adequately prepare for cross examination of defendants' expert witnesses. This is most apparent in regard to defendant Griffin's expert witness, Dr. Cutchin. That Cutchin would be an expert witness for defendant Griffin was revealed to plaintiff on 14 May 1982, and plaintiff was afforded the opportunity to depose him on 23 May 1982, the day before the trial began. Plaintiff never received a complete transcript of Cutchin's deposition because of illness in the court reporter's family. At trial, plaintiff was able to conduct only a cursory cross examination of Cutchin, with no real effort to discredit the substance of his

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testimony. Then, during jury argument, defendant Griffin's counsel commented:

Dr. Larry Cutchin, I was surprised that they didn't even cross-examine him, they didn't even take him on, from Tarboro. They didn't try to discredit him. They knew he was telling the truth and they knew what he was testifying about the standard of care was right.

This made a persuasive argument for the jury, but it ignored the reason that plaintiff was unable to prepare for adequate cross examination of Cutchin; to wit, defendants' late response to plaintiff's requests for discovery. Clearly, the opportunity for plaintiff's counsel to depose defendants' expert witnesses only five days before trial, one day before trial, and the evening of the second day of trial was not sufficient to allow plaintiff's counsel a fair opportunity to prepare. The defendants' supplemental answers identifying the defendants' experts came so close to the time of trial that plaintiff was prevented from preparing adequately for cross examination of defendants' expert witnesses.

We hold that where a case has been set for trial peremptorily, whether on the motion of one of the parties or on the motion of the senior resident judge or chief district court judge, the court may not properly refuse to intervene to compel discovery on a material feature of the case, such as the identity of expert witnesses in a medical negligence case. Plaintiff moved, at the close of their evidence, to exclude testimony of defendants' experts, based on defendants' failure to seasonably supplement their answers. We note that the imposition of sanctions under Rule 37 of the Rules of Civil Procedure for failure to comply with Rule 26(e) is within the sound discretion of the trial judge. *American Imports, Inc. v. G. E. Employees W. Region Fed. Credit Union*, 37 N.C. App. 121, 245 S.E. 2d 798 (1978). But cf. *Shepherd v. Oliver*, 57 N.C. App. 188, 290 S.E. 2d 761, rev. denied, 306 N.C. 387, 294 S.E. 2d 212 (1982). We reverse here, not for the trial judge's failure to impose sanctions under Rule 37, but because of improper denial of plaintiff's motion to compel discovery. The trial court erred in denying on 21 April 1982 plaintiff's motion to compel discovery of expert witnesses' identities when the case previously had been peremptorily set for 24 May 1982. The judg-

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ments in favor of defendants Wilkins and Griffin must be reversed and the case remanded for a new trial.

VI.

We find no merit in two other assignments of error raised by plaintiff. Plaintiff assigns as error the trial judge's failure to instruct the jury to disregard defense counsel's statement to the jury that directed verdicts had been entered against certain co-defendants. The control of arguments of counsel is within the sound discretion of the trial judge, and we find no abuse of that discretion here. See *State v. Cousins*, 289 N.C. 540, 223 S.E. 2d 338 (1976).

Plaintiff also assigns as error the trial court's jury instruction on the issue of abandonment. The trial judge used North Carolina Pattern Jury Instruction No. 809.30: Medical Negligence Duty to Attend, which was amended in 1980 to conform to G.S. 90-21.12, the statute on the "standard of health care." We hold that this instruction was a full and fair charge to the jury on the issue of abandonment.

Reverse and remand for a new trial as to all defendants.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. ELLIS JAMES LUKER, III

No. 8318SC109

(Filed 20 December 1983)

1. Constitutional Law § 46— withdrawal of defense counsel improper

In a criminal prosecution, it was error for the defense counsel to force defendant to elect between having counsel and testifying in his own behalf. While counsel could have advised defendant not to testify, the ultimate decision should have been the defendant's, and defense counsel was wrong to force such an election. G.S. 15A-1242 and G.S. 15A-1243; G.S. 8-54; Sixth Amendment to U.S. Constitution.

2. Constitutional Law § 46— withdrawal of counsel—improper—harmless error

Although defendant was denied his constitutional right to assistance of counsel in presenting his defense when his counsel improperly withdrew after

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the presentation of the State's evidence, defendant was not denied a fair trial, and the constitutional error was harmless beyond a reasonable doubt in that the jury would have reached the same verdict had counsel not withdrawn. The State presented overwhelming evidence of defendant's guilt; defendant had counsel throughout the first two days of trial when the State presented its evidence; during trial, defense counsel rigorously cross-examined the State's witnesses and presented numerous, valid evidentiary objections; before trial, he submitted jury instructions, pursuant to G.S. 15A-1231 on the burden of proof and reasonable doubt, credibility of witnesses, testimony of interested witnesses, testimony of witnesses with immunity or quasi-immunity, accomplice testimony, impeachment of a witness by proof of crime, and effect of the defendant's decision not to testify; except for the effect of defendant's decision not to testify, the judge used all of the requested instructions in his charge to the jury; counsel's representation, prior to his withdrawal, was competent and commendable; and after he withdrew, on the third and last day of trial, he remained as standby counsel to defendant.

3. Bills of Discovery § 6; Constitutional Law § 30— motion for discovery of witness's statements at trial—in-camera examination

There was no merit to defendant's contention that the trial court erred by refusing to give him access to the tape recorded statements of a State's witness where upon defendant's motion, at trial, to discover pre-trial statements made by the State's witnesses to law enforcement personnel, the court found that the only existing statements were tape recorded discussions between the district attorney and the witness; the court conducted an in-camera inspection, found nothing favorable and material to the defense and denied defendant's discovery motion; it then ordered the evidence placed in the record for appellate review; and the steps taken by the trial court were entirely consistent with the procedure outlined in *State v. Hardy*, 293 N.C. 105 (1977).

Judge WELLS concurring in the result.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 15 September 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 October 1983.

Defendant was charged with three counts of second-degree burglary with intent to commit larceny and one count of breaking and entering with intent to commit larceny. Upon the State's motion, the cases were consolidated for trial. The jury returned verdicts finding defendant guilty of all charges and defendant appeals.

The State's evidence tended to show: Some time in mid February 1982, defendant and three companions, Neil Ravis Reeves, Angela Gaines and Freida Chadwick, drove to Greens-

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boro and registered for a room at a "Motel 6" where all four stayed.

Some time during the day on 20 February 1982, defendant broke into and entered the dwelling house of Milas Hilton, in Greensboro, and took items of personal property worth about \$1,500.

Some time between 7:00 p.m. on 20 February and 8:00 a.m. on 21 February 1982, defendant broke into and entered the dwelling house of Wayne Miller, in Greensboro, and took items of personal property worth about \$175.

Some time between 7:00 p.m. and 10:00 p.m. on 24 February 1982, defendant broke into and entered the dwelling house of Emily Ribet, in Greensboro, and took items of personal property worth about \$1,150.

Some time between 7:30 p.m. and 11:45 p.m. on 24 February 1982, defendant broke into and entered the dwelling house of Donna Johnson, in Greensboro, and took personal property worth about \$300.

At no time did defendant have the owners' consent to enter the above-mentioned dwelling houses.

Evidence for the defendant tended to show: Defendant testified that he was not involved in any of the offenses charged. He testified that Reeves, Gaines and Chadwick brought various items of personal property to the motel room, but that he never knew where such property had come from.

During trial, immediately before the State rested, and after the State's witnesses had testified and been cross-examined by defense counsel, defense counsel made a motion to discover any statements the State's witnesses may have made before trial to law enforcement personnel. The court found that the only statements in the State's possession were some tape recorded discussions between the district attorney and witness Neil Ravis Reeves. The court, furthermore, found that defendant had had a clear and ample opportunity and did, in fact, cross-examine the witness about any statements he had made to police officers.

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The court, therefore, concluded that if a motion to recall the witness for further cross-examination were to be made, it would deny such motion. The court found, as a matter of law, that the defendant had had a thorough and ample opportunity to cross-examine the witness, that the motion was untimely, and that the defendant's constitutional right to cross-examine the witness had not been breached.

The court made an in-camera inspection of the tape recordings and found that nothing in the tapes was favorable and material to the defense. It concluded as a matter of law that defendant was not entitled to further discovery and ordered that such tapes be placed in the Record for appellate review.

Also, during trial, after the State had rested, defense counsel called to the court's attention a conflict between defendant and counsel. Defendant wished to testify but counsel believed that testifying would be prejudicial to defendant. Defense counsel stated that he would not put defendant on the witness stand if he continued to represent him and that defendant did want to testify. Defendant stated that he wanted to testify and the disagreement over whether to testify was the only conflict between counsel and himself. When asked why he wanted to testify, defendant stated that he didn't think he had much chance of being found not guilty unless he testified.

The court found as a fact that the defendant had made an oral motion to discharge his attorney. The court next found that defendant's counsel was capable and competent, that defendant and counsel had been able to communicate, and that the disagreement over trial tactics as to whether or not defendant would testify in his own behalf was not a conflict that would render assistance of counsel ineffective. The court denied defendant's motion to discharge his attorney, finding that such discharge would be disruptive to the trial and court procedure and that defendant's reasons were not legally sufficient to require discharge. After such order, defendant and counsel found themselves at an impasse. The court, thereupon, changed its order and granted defendant's motion to discharge his attorney, based on defendant's right of self-representation. The court, however, instructed defendant's attorney to act as standby counsel.

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Attorney General Edmisten, by Thomas B. Wood, Assistant Attorney General, for the State.

Ann B. Petersen, Assistant Appellate Defender, and Adam Stein, Appellate Defender, for the defendant appellant.

VAUGHN, Chief Judge.

[1] It is a cardinal principle of criminal law that an indigent defendant has the right under the Sixth Amendment of the United States Constitution to assistance of counsel for his defense. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963); *State v. Hutchins*, 303 N.C. 321, 279 S.E. 2d 788 (1981); *see also* N.C. Const. Art. I, § 23.

Upon defendant's affidavit of indigency in the case at bar, counsel was appointed on 4 March 1982. Counsel represented defendant for approximately six months until he withdrew in the middle of September during defendant's trial. During trial, after the State had rested, counsel and defendant disagreed over whether defendant should testify. Defendant's attorney stated that he would withdraw if defendant testified. Defendant chose to testify. Defendant now contends that forcing him to choose between being represented by counsel and testifying in his own defense deprived him of his right to counsel and to equal protection and due process of law. In light of defendant's Sixth Amendment right to representation, we think that it was error for defense counsel to withdraw; nevertheless, we hold that such error was harmless beyond a reasonable doubt.

It is the obligation of the attorney, once appointed, to serve as counselor and advocate to his client. *See* Standards For Criminal Justice, the Defense Function, § 4-1.1 (1982 Supp.). The relationship between the client and his attorney is like that of principal and agent, not ward and guardian. *State v. Barley*, 240 N.C. 253, 81 S.E. 2d 772 (1954). "While an attorney has implied authority to make stipulations and decisions in the management or prosecution of an action, such authority is usually limited to matters of procedure[.]" *Id.* at 255, 81 S.E. 2d at 773. In *State v. Barley*, defendant's attorney tendered a plea of "*nolo contendere*" even though defendant protested his innocence and wished to

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enter a plea of "not guilty." Our Supreme Court set aside the judgment against defendant entered without a jury and remanded the case for trial on defendant's plea of "not guilty." "[O]rdinarily," the Court explained, "a stipulation operating as a surrender of a substantial right of the client will not be upheld." *Id.* at 255, 81 S.E. 2d at 773.

Like the decision regarding how to plead, the decision whether to testify is a substantial right belonging to the defendant. While strategic decisions regarding witnesses to call, whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer, certain other decisions represent more than mere trial tactics and are for the defendant. These decisions include what plea to enter, whether to waive a jury trial and *whether to testify in one's own defense*. ABA Standards For Criminal Justice, the Defense Function, § 4-5.2 (1982 Supp.); *Wainright v. Sykes*, 433 U.S. 72, 91, 97 S.Ct. 2497, 2509, 53 L.Ed. 2d 594, 611 (1977), (Burger, C.J., concurring).

While at common law, criminal defendants were not competent to testify in their own behalf, G.S. 8-54 removes this barrier and provides that every person, including a criminal defendant is a competent witness. Similarly, under 18 U.S.C. § 3481, federal criminal defendants have the right to testify.

The United States Supreme Court has intimated and several recent courts have concluded that the right to testify is not only a statutory right, but is a constitutional right, as well. Although not specifically guaranteed in the Constitution, these courts have held that the right to testify emanates from the due process requirements of the Fifth and Fourteenth Amendments and from the compulsory process clause of the Sixth Amendment. *See, e.g., United States v. Bifield*, 702 F. 2d 342 (2d Cir.), *cert. denied*, --- U.S. ---, 103 S.Ct. 2095, 77 L.Ed. 2d 304 (1983); *Alicea v. Gagnon*, 675 F. 2d 913 (7th Cir. 1982); *United States ex rel. Wilcox v. Johnson*, 555 F. 2d 115 (3d Cir. 1977). In *Brooks v. Tennessee*, 406 U.S. 605, 612, 92 S.Ct. 1891, 1895, 32 L.Ed. 2d 358, 364 (1972), the United States Supreme Court stated: "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." In *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed. 2d 562, 572 (1975), the Court ex-

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plained that the right to self-representation and to make one's own defense personally, though not stated outrightly in the Sixth Amendment, is necessarily implied by its structure. We think that the right to testify in one's own behalf is further implied from the right to self-representation. We draw upon inferences from United States Supreme Court cases and holdings in other jurisdictions when we conclude that defendant's right to testify emanates from the Sixth Amendment and is "essential to due process of law in a fair adversary process." *Id.* (n. 15).

While it is true that a defendant may waive a constitutional right like the right to testify or to be represented, such waiver must be knowledgeable and voluntary. See *Faretta v. California*, *supra*; *State v. Hutchins*, *supra*. Under G.S. 15A-1242, a defendant may proceed at trial without the assistance of counsel if the trial judge makes a thorough inquiry and is satisfied that defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled.
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Under G.S. 15A-1243, when a defendant has elected to proceed without counsel, the trial judge may, in his discretion, appoint standby counsel to assist defendant when called upon to bring to the judge's attention matters favorable to the defendant.

In the case at bar, though no formal motion had been made, the court found as fact that defendant had made a motion to discharge his attorney. The following colloquy then occurred:

THE COURT: Mr. Luker, as I understand it, you have arrived at some conflict with your attorney as to whether or not you are going to take the stand. Does that conflict still exist?

MR. LUKER: Yes, sir.

THE COURT: Let me explain to you that you do have the right to the assistance of counsel, including the right to assignment of counsel, and your lawyer has been appointed. Do you un-

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derstand that you have the right to be represented by this Court-appointed attorney, don't you?

MR. LUKER: Yes, sir.

THE COURT: Do you understand that if I allow your attorney to withdraw and let you conduct this case yourself as your own lawyer that I cannot assist you; that I would have to hold you to the same standards that I would hold an attorney; that you will have the sole responsibility of conducting your trial yourself, making decisions; do you understand that?

MR. LUKER: Yes, sir.

THE COURT: Do you understand as a result of these cases you're charged with that you could get up to one-hundred and seventy years in prison?

MR. LUKER: Yes, sir.

THE COURT: And that the presumptive sentence alone if given consecutively would be fifty-seven years. Do you understand that?

MR. LUKER: Say that again.

THE COURT: The presumptive sentence on these charges would be fifty-seven years if they are to run at the expiration of each other. Do you understand that?

MR. LUKER: Yes, sir.

THE COURT: You do understand that if I let your lawyer withdraw you have to put on your own witness, your own evidence, then you're going to have to make your own jury argument at the end of the case? Do you understand that?

MR. LUKER: Yes, sir. I'm not saying I'm a lawyer by a long shot. But could the Court help me, instruct me in doing that?

THE COURT: I can't help you. That is what I'm saying. I can't help you at all. You have the right to be your own lawyer. But I can't assist you. You will have to make your own final argument.

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I might say what I will do. See, I'm going to ask Mr. Farran to sit behind you and act as what we call a stand-by counsel.

The judge's conduct and ruling would have been entirely proper under G.S. 15A-1242 and 1243 had defendant voluntarily opted to represent himself. Defendant's motion, however, was not voluntary. The following exchange precipitated the judge's finding that defendant had made a motion to discharge his attorney.

THE COURT: This is a disagreement over whether or not you will take the stand or whether you will exercise your right to remain silent?

MR. LUKER: Yes, sir.

THE COURT: And other than that, you have had no conflict with your lawyer?

MR. LUKER: No, sir.

THE COURT: Other than that, you're satisfied with his services?

MR. LUKER: Yes, sir.

THE COURT: You understand that you have the right to represent yourself.

You are not asking to fire your lawyer, are you?

MR. LUKER: Yes, sir. I think that is what we're going to have to do, if we can't come to no other conclusion.

The Record reveals that defendant was forced to elect between having counsel and testifying in his own behalf. Such election was improper. While counsel could have advised defendant not to testify, the ultimate decision should have been the defendant's. Defendant's dilemma has been characterized by other courts as a "Hobson's choice," i.e., a dilemma involving the relinquishment of one constitutional right in order to assert another. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247 (1968); see *United States ex rel. Wilcox, supra*. In this case, by choosing to testify, defendant was forced to give up his constitutional right to counsel.

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We note that nothing in the Record suggests that counsel's withdrawal was premised on a belief that defendant would perjure himself on the witness stand. An attorney who learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of fraud on the court, has an obligation to withdraw, seeking leave of the court, if necessary. *In re Palmer*, 296 N.C. 638, 252 S.E. 2d 784 (1979). Whether an attorney can or should withdraw once trial has begun and his client insists on testifying falsely is a hotly debated issue, not now before this Court.

[2] Although defendant was denied his constitutional right to assistance of counsel in presenting his defense, we do not conclude that defendant was denied a fair trial. Since we have determined that there was a constitutional error, our next step is to determine whether such error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705, *reh. denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed. 2d 241 (1967); *see also United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed. 2d 564, *reh. denied*, 450 U.S. 960, 101 S.Ct. 1420, 67 L.Ed. 2d 385 (1981); *Moore v. Illinois*, 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed. 2d 424 (1977). In *Chapman v. California*, the United States Supreme Court formulated a rule whereby a constitutional error is harmless if honest, fair-minded jurors would have reached the same verdict had there been no such error. A harmless error rule, the Court explained, serves an important function insofar as it blocks setting aside convictions for small errors or defects which would not have changed the result at trial. 386 U.S. at 22, 87 S.Ct. at 827, 17 L.Ed. 2d at 709. In both *Moore v. Illinois* and *United States v. Morrison*, the circuit courts had reversed judgments entered against the defendant, finding that defendants' Sixth Amendment rights to counsel had been violated. In both cases, the Supreme Court reversed and remanded so that a determination could be made as to whether such constitutional error was harmless. In the instant case, the violation of defendant's constitutional right to counsel was harmless. We believe the jury would have reached the same verdict had counsel not withdrawn.

The State presented overwhelming evidence of defendant's guilt. All three accomplices gave similar testimonies as to defendant's involvement in the crimes charged. Ms. Gaines and Ms. Chadwick testified that Reeves and defendant left their motel

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room on the evenings of the burglaries and returned with a sundry of goods. Reeves testified that he and defendant broke into the victims' homes and stole various items of property. A Greensboro detective testified that Reeves identified the homes he and defendant broke into and that these homes were the homes of the three victims. Ms. Gaines' attorney testified that from the start, before any plea bargaining, Ms. Gaines had told him of defendant's involvement. A Winston-Salem fraud investigator testified that when Ms. Chadwick was apprehended for using a stolen credit card, she told him that defendant had given her the card. Furthermore, when defendant later testified, he opened the door, admitting evidence of his prior criminal history, including his recent escape from an Alabama penitentiary, where he had been imprisoned on several counts of burglary, even though its only relevance may have been to show his character or disposition to commit the crimes charged. *See State v. Allen*, 50 N.C. App. 173, 272 S.E. 2d 785 (1980), *appeal dismissed*, 302 N.C. 399, 279 S.E. 2d 353 (1981).

For the defense, defendant testified that he did not commit any of the burglaries charged. Defendant called one other witness who testified, in pertinent part, that while in jail, he overheard Ms. Gaines tell defendant: "Well, you know what I have to do, so that I won't get a lot of time."

Defendant had counsel throughout the first two days of trial when the State presented its evidence. During trial, defense counsel rigorously cross-examined the State's witnesses and presented numerous, valid evidentiary objections. Before trial, he submitted jury instructions, pursuant to G.S. 15A-1231 on burden of proof and reasonable doubt, credibility of witnesses, testimony of interested witnesses, testimony of witnesses with immunity or quasi-immunity, accomplice testimony, impeachment of a witness by proof of crime, and effect of the defendant's decision not to testify. Obviously, except for the effect of defendant's decision not to testify, the judge used all of the requested instructions in his charge to the jury. Counsel's representation, prior to his withdrawal, was competent and commendable. After he withdrew, on the third and last day of trial, he remained as standby counsel to defendant.

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In *Chapman v. California*, the prosecutor commented extensively on the defendant's failure to testify and the judge told the jury that it could draw adverse inferences from defendant's silence. The Court found that such error was not harmless and explained:

In fashioning a harmless constitutional error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one.

386 U.S. at 22, 87 S.Ct. at 827, 17 L.Ed. 2d at 710. In the case at bar, the question of defendant's guilt or innocence was not close. Application of the harmless error rule, therefore, brings about the most fair result.

We are further persuaded by the reasoning in *United States v. Morrison*, *supra*, in which the Court said:

The Sixth Amendment provides that the accused have the right 'to have the Assistance of Counsel for his defense.' This right, fundamental to our system of justice, is meant to assure fairness in the adversary criminal process

At the same time and without detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.

449 U.S. at 364, 101 S.Ct. at 667-68, 66 L.Ed. 2d at 567-68.

[3] In his last assignment of error, defendant contends that the trial court erred by refusing to give him access to the tape recorded statements of State's witness, Ravis Reeves. We find no merit in defendant's contention. The procedure followed by the trial court was entirely proper under North Carolina law. Unlike under federal law, in North Carolina, a defendant is not automatically entitled to discover prior statements of a material State's

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witness. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). Pursuant to *State v. Hardy*, when defendant makes a request at trial, for disclosure of evidence in the State's possession that is relevant, competent and not privileged, the trial court is required, at a minimum, to order an in-camera inspection of the evidence and make appropriate findings of fact. If the court, then, rules against defendant on his motion, it should order the sealed evidence placed in the Record for appellate review.

Reeves' tape recorded statements, in the instant case, were relevant and competent, and when Reeves took the stand, they lost their privileged work product status with respect to matters covered in his testimony. *State v. Hardy, supra*. Upon defendant's motion, at trial, to discover any pre-trial statements made by State's witnesses to law enforcement personnel, the court found that the only existing statements were tape recorded discussions between the district attorney and Reeves. The court conducted an in-camera inspection, found nothing favorable and material to the defense and denied defendant's discovery motion. It then ordered the evidence placed in the Record for appellate review. The steps taken by the trial court were entirely consistent with the procedure outlined in *State v. Hardy, supra*. See also *State v. Vonnannon*, 49 N.C. App. 637, 272 S.E. 2d 153 (1980), *reversed on other grounds*, 302 N.C. 619, 276 S.E. 2d 370 (1981).

The majority's review of the tapes in question fails to disclose anything material and favorable to the defense. Defendant was accorded substantive and procedural due process.

No error.

Judge JOHNSON concurs.

Judge WELLS concurs in the result.

Judge WELLS concurring in the result.

I do not believe that the decision of our Supreme Court in *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), requires the trial court to conduct an *in camera* review of tape recorded statements which have not been reduced to a written transcript. For this reason, I have not reviewed the tape recording filed by

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defendant in this case. I am convinced that such a requirement, if adopted and followed, would result in an enormous waste of judicial time.

GENE EDWARD PLOTT v. SYLVIA FAYE EVANS PLOTT

No. 8221DC1069

(Filed 20 December 1983)

Divorce and Alimony §§ 24.1, 24.9, 24.11— child support order—inadequate findings—inadequate consideration to fairness of award—abuse of discretion in basing amount on mathematical equation

A child support order which required defendant-mother to pay \$150.00 in monthly child support and the sum of \$1,687.50 in retroactive child support to plaintiff-father must be vacated where the trial court (1) failed to make adequate factual findings, (2) failed to give adequate consideration to the fairness of its award in light of the parties' relative financial abilities and of the relative hardship to each party resulting from the contribution required, and (3) abused its discretion in basing the amount of defendant's contribution on a mathematical equation rather than her relative ability or inability to provide support as required by G.S. 50-13.4(b) and (c). The 1981 amendment to G.S. 50-13.4(b) had the effect of changing the previous rule that the mother was only secondarily liable for child support, but in all other relevant respects involving the relative ability or inability of the mother and father to provide such support, the relevant statutory provisions remain unchanged.

APPEAL by defendant from *Tash, Judge*. Order entered 26 July 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 31 August 1983.

Defendant, Sylvia Faye Evans Plott, appeals from an order directing her to contribute to the financial support of the minor child born of her marriage to plaintiff, Gene Edward Plott.

David F. Tamer, for defendant appellant.

Morrow and Reavis, by John F. Morrow, for plaintiff appellee.

JOHNSON, Judge.

In this appeal from an order requiring her to contribute to the financial support of the parties' minor child, the defendant

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mother challenges the trial court's finding of fact regarding her reasonable living expenses and available income, as well as the entry of the order requiring her to pay \$150.00 in monthly child support and the sum of \$1,687.50 in retroactive child support to the plaintiff father. We hold that the payments required of defendant by the order appealed from must be vacated and the cause remanded to the District Court for further proceedings.

The record discloses that this is the second time defendant's case has been presented to this Court. The facts are as follows: plaintiff and defendant were formerly husband and wife, having been married on 11 January 1964. On 12 August 1979, the parties separated and they did not thereafter resume the marital relationship. A judgment of absolute divorce was entered on 22 September 1982.

One child, Timothy Eugene Plott, was born of the marriage on 14 September 1969. The minor child has remained in the custody of the plaintiff father since the parties' separation. On 26 September 1980, the plaintiff moved for a determination of child custody and support. The parties entered into a consent order on 26 November 1980, under which plaintiff received custody of their minor child. The motion regarding support was heard in District Court, Forsyth County. On that same date, Judge Freeman entered an order containing findings of fact that the plaintiff's net income was \$1,800.00 per month; that his reasonable monthly living expenses were \$1,400.00; that the child's reasonable monthly living expenses were \$615.00; and that defendant's net income was \$850.00 per month and her reasonable monthly living expenses were \$850.00. Based upon these findings of fact, the court concluded that the defendant mother should be required to pay as child support \$135.00 per month and that plaintiff should be awarded a writ of possession of the parties' marital home. The defendant gave notice of appeal and on 3 November 1981, this Court, in an unpublished opinion (No. 8121DC210), reversed Judge Freeman's order and remanded the cause for further proceedings.

The first order compelling defendant to share in the financial responsibility of child support was reversed on two grounds: (1) the court's finding that defendant's reasonable needs *equaled* her net income tended to negate, rather than support, the conclusion that she is *capable* of providing support payments and (2) the

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order manifestly allocated an inordinate proportion of the total resources of the parties, the residence and combined earnings, to the plaintiff and the child.

We note that at the time of the first hearing, the relevant statute governing an action for the support of a minor child, G.S. 50-13.4(b) provided, in pertinent part:

In the absence of pleading and proof that circumstances of the case otherwise warrant, *the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all of the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child.* . . . (Emphasis added.)

The provision was construed to place the primary duty of providing child support on the father, in the absence of circumstances that "otherwise warrant." Accordingly, the mother's duty was held to be secondary, and a determination that the father could not reasonably provide all of the support had to precede the placing of any support obligation on the mother. *In re Register*, 303 N.C. 149, 277 S.E. 2d 356 (1981); *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976). Read in conjunction with its companion section, G.S. 50-13.4(c),¹ the "two statutes clearly contemplate a mutuality of obligation on the part of both parents to provide material support for their minor children where circumstances preclude placing the duty of support upon the father alone." *Coble v. Coble*, 300 N.C. 708, 711, 268 S.E. 2d 185, 188 (1980).

In June, 1981, these statutory provisions were amended to make *both* the father and mother *primarily liable* for the support of a minor child. See Session Laws, 1981, c. 613, s. 1. At the time

1. G.S. 50-13.4(c) then provided:

Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education and maintenance, *having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties and other facts of the particular case.* (Emphasis added.)

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of the second hearing, the relevant sentence of G.S. 50-13.4(b) (Cum. Supp. 1981) read:

In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. (Emphasis added.)

Subsection (c) was likewise amended to require that the court give due regard to "the child care and homemaker contributions of each party" in setting the amount of child support payments.

Thus, in hearings and trials held after 1981, both parents have equal support duties under the law, absent pleading and proof that circumstances otherwise warrant. In a survey of 1981 family law, 60 N.C. L. Rev. 1379, 1394 (1982), the author remarked, "Although many others cannot actually contribute equally to support their children, this amendment reflects the reality that more mothers are now financially able to share childraising responsibilities with the father." It is noteworthy that although the amendment had the effect of changing the previous rule that the mother was only secondarily liable for child support, in all other relevant respects involving the *relative ability or inability* of the mother and father to provide such support, the relevant statutory provisions remained unchanged. This Court, in *Wilkes County v. Gentry*, 63 N.C. App. 432, 305 S.E. 2d 207 (1983), noted in passing that although G.S. 50-13.4(b) now places the primary liability for the support of a minor child on both parents, other circumstances may properly be considered, including the relative ability of the parties to pay. G.S. 50-13.4(c). Against this backdrop, the second hearing to determine defendant's support obligation was conducted.

Both parties testified before Judge Tash and both parties submitted affidavits of financial standing. Based upon this evidence, the trial court made the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

(5) The gross income of the plaintiff is \$2,916.67 per month; that the plaintiff's net income after taxes is \$1,980.65; that

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the reasonable living expenses of the plaintiff, including payments due on the outstanding loans, are \$1,114.25 per month; that the available income of the plaintiff over and above his reasonable expenses is approximately \$886.00 per month;

(6) The gross income of the defendant is \$1,285.00 per month; that the defendant's net income after taxes if (sic) \$957.48 per month; that the reasonable living expenses of the defendant, including payments due on outstanding loans, is \$777.00 per month; that the available income of the defendant over and above her reasonable expenses is approximately \$180.00 per month;

(7) The reasonable needs of the minor child of the parties for health, education and maintenance is approximately \$625.00 per month . . .

(12) The relative ability of the plaintiff to provide support for the minor child of the parties is approximately four times the ability of the defendant to provide said support;

(16) The defendant has savings in her credit union in an amount of approximately \$2,500.00, and that said amount is in excess of monies owed to said credit union; that the defendant owes her attorney \$5,276.00 for legal services.

CONCLUSIONS OF LAW

(1) Taking into consideration the reasonable needs of the minor child for health, education and maintenance and having due regard to the earnings, conditions, accustomed standard of living of the child of the parties, the child care and homemaker contributions of each party, and other facts of this particular case, including, *inter alia*, the fact that the plaintiff is being awarded a writ of possession of the former homeplace of the parties and the household and kitchen furnishings therein as part of the order of child support herein, the defendant should be ordered to pay child support into the Office of the Clerk of Superior Court of Forsyth County, North Carolina, in the amount of \$150.00 per month . . .

(3) As the defendant has not provided financial support for the minor child of the parties since the hearing conducted

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herein in November, 1980, and as the terms and provisions of N.C.G.S. 50-13.3(b) were amended and became effective on June 18, 1981, while the previous order entered herein was being appealed from by the defendant and while said case was pending appeal, the defendant should be ordered to pay retroactive child support from June 18, 1981, and not from the date of the original hearing herein;

(4) Taking into consideration the reasonable needs of the minor child for health, education and maintenance and having due regard to the earnings, conditions, accustomed standard of living of the child of the parties, the child care and homemaker contributions of each party, and other facts of this particular case, the defendant should be ordered to pay \$135.00 per month retroactive support payments, a total of \$1,687.50 for 12½ months, on or before the 17 day of September, 1982.

Defendant assigns error to the trial court's finding of fact related to her reasonable living expenses and available income and to the conclusions of law fixing her child support obligation at \$150.00 per month and requiring her to pay \$1,687.50 in retroactive child support. Defendant argues that the trial court's findings of fact are unsupported by the evidence and that its conclusions of law amount to an abuse of discretion. Thus, the issue raised by this appeal is whether the trial court may order the non-custodial mother to contribute nearly all of her available monthly income, as determined by the court, to the support of the parties' minor child where the evidence shows the custodial father to be more than capable of independently meeting the reasonable needs of the child out of his available monthly income. Although defendant's challenge to the trial court's determination of the amount of her monthly child support contribution presents an issue of first impression under the amended statute, certain general principles of law developed under G.S. 50-13.4(b) and (c) when the mother's support liability was only secondary are readily applicable to the issue presented.

It is well established that the determination of child support must be done in such a way that reflects fairness and justice for all concerned. *Coble v. Coble, supra; Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976). In order to be fair and just, the court

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entering an order for child support must consider not only the needs of the child, but also the abilities of the parents to provide support. *Martin v. Martin*, 263 N.C. 86, 138 S.E. 2d 801 (1964); *Poston v. Poston*, 40 N.C. App. 210, 252 S.E. 2d 240 (1979). The amount awarded for child support is in the sound discretion of the trial judge and will be disturbed only where abuse of discretion is shown. *Coggins v. Coggins*, 260 N.C. 765, 133 S.E. 2d 700 (1963).

Our Supreme Court has most recently stated the law with respect to setting amounts for child support in *Coble v. Coble*, *supra*,

Where, as here, the trial court sits without a jury, the judge is required to "find the facts specifically and state separately its conclusions of law thereon and direct entry of the appropriate judgment." . . . The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." . . .

Under G.S. 50-13.4(c) . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon *factual findings specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents*. It is a question of fairness and justice to all concerned . . . *In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence.* . . .

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We note moreover that before liability or need may be predicated upon an analysis of the balance sheets of the respective parties, the trial court should be satisfied that the personal expenses itemized therein are reasonable under all the circumstances. We mention this consideration simply to remind the trial bench that a party's mere showing that expenses exceed income need not automatically trigger the conclusion that the expenses are reasonable, or that the party is incapable of providing support and in need of additional assistance . . . (Citations omitted.) (Emphasis added.)

300 N.C. at 712, 714, 268 S.E. 2d at 188-190.

Turning first to Finding of Fact No. 6 concerning defendant's reasonable monthly expenses, we hold that it is not specific enough to indicate to this Court that the judge below took due regard of the particular conditions and accustomed standard of living of the defendant mother. *Coble v. Coble, supra*. The financial evidence of record consists primarily of the affidavits of financial standing submitted by the parties. Oral testimony by the parents filled in the relevant "conditions" of this case. Plaintiff's affidavit lists the following pertinent monthly figures:

GROSS WAGES	2,916.67
Deductions [withholding]	* * *
Loans (Including Auto)	285.76
Others (Specify) Bell	
Systems Savings	175.00
NET WAGES	1,519.89
TOTAL EXPENSES	761.37

Defendant's affidavit lists the following pertinent monthly figures:

GROSS WAGES	1,285.00
Deductions [withholding]	* * *
Retirement	100.00
Loans	100.00
Others	10.36
NET WAGES	747.12
TOTAL EXPENSES	747.00

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The trial court's findings regarding the parties are as follows:

PLAINTIFF

GROSS INCOME	2,916.67
NET INCOME	1,980.65
REASONABLE EXPENSES	1,114.25
AVAILABLE INCOME	886.00

DEFENDANT

GROSS INCOME	1,285.00
NET INCOME	957.48
REASONABLE EXPENSES	777.00
AVAILABLE INCOME	180.00

CHILD

REASONABLE NEEDS	625.00
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A close examination of the record indicates that the trial court arrived at these figures by using the gross income figures supplied by the parties and then adding their indicated deductions for loans, savings and retirement back into the net income figure supplied by the parties, but later subtracting these items again as part of the parties' reasonable monthly expenses. However, while the trial judge apparently accepted all of plaintiff's listed expenses as reasonable, including his payroll savings deductions of \$175.00 per month, only \$567.00 of defendant's listed expenses of \$747.00 were found to be reasonable. Without a specific finding of fact indicating why, under the circumstances, defendant's itemized personal expenses were not reasonable, this Court cannot adequately make its determination whether the order predicated the amount of liability upon an analysis of the balance sheets of the respective parties is adequately supported by competent evidence. Although a party's mere showing of expenses does not automatically trigger the conclusion that the expenses are reasonable, *Coble v. Coble, supra*, it stands to reason that when the trial court rejects itemized expenses as unreasonable, the order must contain sufficiently specific factual findings to allow effective appellate review of such a determination. The order under review is deficient in this regard.

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However, assuming *arguendo* that the trial court's computations are correct, we hold that, in view of the striking discrepancy in the parties' *respective abilities* to provide support under the facts of this case, the order requiring the defendant mother to contribute one-fourth of the amount necessary for the child's support constitutes an abuse of discretion.

Although G.S. 50-13.4(b) provides that mothers and fathers both share primary liability for the support of their minor children, thus imposing an equal legal duty on the parent of each gender, it neither mandates equal financial contributions nor requires any contribution from either party where it is proved that the circumstances otherwise warrant. It would appear that the trial court may now order the mother to contribute without first finding, as was the prior rule, that the father alone could not reasonably provide all of the support. See e.g. *In re Register*, *supra*. The revisions leave the trial court with considerable discretion under G.S. 50-13.4(b) and (c) in determining *whether and in what amounts* the party from whom support is sought may be ordered to provide it. Therefore, the trial court in the instant case had a duty to exercise an informed and considered discretion with respect to the mother's support obligation of the parties' child. The following useful description of the "sound" or "judicial" discretion referred to in *Coggins v. Coggins*, *supra*, is contained in a California case involving a question of the extent of a non-custodial mother's support obligation:

[R]eference is made to the trial court's "sound discretion." This we equate with the term, "judicial discretion," . . . as a term which implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [Par.] To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision. (Citation omitted.)

Marriage of Muldrow, 61 Cal. App. 3d 327, 332, 132 Cal. Rptr. 48, 51 (1976).

In the instant case, the trial court fixed defendant's support obligation according to a simple mathematical calculation based on the amount of available income the court set for each party:

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the plaintiff's available income of \$886.00 per month was found to be approximately four times the amount of defendant's \$180.00 per month, therefore, defendant's share of the support obligation was set at one-fourth of the \$625.00 needed by the child, or \$150.00 per month. Such a calculation can hardly be considered an exercise of "discriminating judgment within the bounds of reason." Rather, it constitutes an abuse of discretion. See *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963) (fixing the amount of child support by dividing the income of the husband by the number of people dependent upon him for support is not approved).

The relative ability of the parties to contribute under G.S. 50-13.4(b) and (c) cannot depend solely on the determination of monthly available income after expenses. Rather, it must be reflective of *all* the relevant circumstances, including the relative hardship to each parent in contributing to the reasonable needs of the child.

The evidence presented tended to show a substantial discrepancy in the parties' respective net incomes. Plaintiff has been employed at the Western Electric Company for 18 years. His monthly net income as found by the court is \$1,980.65. Defendant's net income was found to be \$957.48 per month. The plaintiff's discretionary income was set at \$886.00 per month, a sum which approximates the defendant's entire net income. The consequent greater hardship to defendant from the support order is thus evident.

Furthermore, the defendant testified that she worked nearly continuously during the marriage and that she and plaintiff pooled their respective earnings to maintain their standard of living. However, upon the dissolution of their marriage, the plaintiff refused to give her any of the household furnishings to use in her apartment. Consequently, defendant was required to take out a loan in order to buy adequate furniture. Although a list of items of personal property acquired by the parties during the course of their marriage was included in the record, the plaintiff refused to divide them with defendant. In addition to retaining possession of the parties' home, then, plaintiff has continued to enjoy the possession and use of substantially all of the property which was acquired by the parties during the course of their marriage.

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Although the order states that, "due regard was given to the earnings, conditions, accustomed standard of living of the child of the parties, the child care and homemaker contribution of each party, and other facts of this particular case, including, *inter alia*, the fact that the plaintiff is being awarded a writ of possession of the former homeplace of the parties and the household and kitchen furnishings therein," the amount fixed is not reflective of those considerations in view of the evidence presented.

The net effect of requiring defendant to contribute all but \$30.00 of her monthly available income, assuming that the court's calculations are correct, while allowing plaintiff to retain \$411.00 after his contribution to the child's support under the order results in a far greater hardship to the defendant than plaintiff. This is particularly true under the circumstances of this case, where the plaintiff has retained the possession and use of the marital house and household, while defendant has had to establish her own household "from scratch." An order for the maintenance of a child should be in an amount that is fair and not confiscatory in light of the parent's earning ability. *See Fuchs v. Fuchs, supra*. *See also Post v. Moore*, 99 Misc. 2d 812, 417 N.Y.S. 2d 426 (1979) (although apportionment of the costs of a child's support between his father and mother according to their respective means and responsibilities is statutorily authorized, it is not required where the mother is financially unable to assist the father with support of their son); *Cooper v. Cooper*, 513 S.W. 2d 229 (Tex. Civ. App. 1974) (where state constitution provides that equality under the law shall not be denied or abridged because of sex, it must be presumed that duty of spouses to support their minor children is equal, but this does not mean that court must divide burden of support equally, and court's order in this respect should reflect due consideration of their respective ability to contribute); *Faitz v. Ruegg*, 114 Cal. App. 3d 967, 171 Cal. Rptr. 149 (1981) (enforcement of each parent's statutory duty to contribute child support depends on the urgency of the needs of the child and the relative hardship to each parent in contributing to these needs). *See generally* 59 Am. Jur. 2d, Parent and Child, § 61 (1971).

Thus, it is evident that the trial court (1) failed to make adequate factual findings, (2) failed to give adequate consideration to the fairness of its award in light of the parties' relative financial abilities and of the relative hardship to each party resulting from

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the contribution required, and (3) abused its discretion in basing the amount of defendant's contribution on a mathematical equation rather than her relative ability or inability to provide support as required by G.S. 50-13.4(b) and (c). Therefore, the order must be vacated and the cause remanded for further proceedings not inconsistent with this opinion.

In view of our disposition of this issue, we need not reach the question presented challenging the amount of defendant's retroactive child support obligation as these calculations must be determined anew upon retrial.

Vacated and remanded.

Judges BECTON and BRASWELL concur.

STATE OF NORTH CAROLINA v. RONALD GOODEN

No. 835SC514

(Filed 20 December 1983)

Automobiles and Other Vehicles § 113.2— negligence in parking on highway—insufficient evidence of involuntary manslaughter

While the evidence was sufficient to raise an inference that defendant was negligent in violating statutes pertaining to parking or leaving standing a vehicle upon the paved portion of the highway and warning signals and lights for such vehicles and that such negligence was a proximate cause of the deaths of three passengers in an automobile which struck defendant's truck, the evidence was insufficient to permit an inference that the acts or omissions of defendant constituted a willful, wanton or intentional violation of the statutes or a heedless or thoughtless indifference to the safety of others so as to support conviction of defendant for involuntary manslaughter. G.S. 20-129(a) and (d); G.S. 20-134; G.S. 20-161(a), (b) and (c).

APPEAL by defendant from *Barefoot, Judge*. Judgments entered 19 November 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 December 1983.

Defendant was charged, tried, and convicted in three cases of involuntary manslaughter arising out of the deaths of Serena Bowden Merritt, Emily Merritt, and Martha J. Merritt. Defendant was also charged with, tried, and convicted of operating a motor

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vehicle in violation of a limited driving privilege under N.C. Gen. Stat. Sec. 20-28(a).

The evidence offered at trial tends to show the following: On 7 August 1982 at approximately 10:00 p.m. the defendant was operating a 1971 Chevrolet flatbed truck, owned by his employer, in a southerly direction along Highway 132 in New Hanover County. Highway 132 is a four lane highway that is bounded on each side by a four foot paved shoulder. The body of the truck was approximately fourteen feet long and seven feet, eleven and one-half inches wide. After running out of gas, the vehicle came to rest with five feet, eleven inches of its frame in the highway's right lane, and two feet, one-half inch of the frame on the paved shoulder. The highway at the point of collision was generally straight and level. The weather conditions were "clear," but it was "unusually dark" on that occasion. The highway surface was dry.

After the truck ran out of gas, the defendant left the vehicle to get gas. Witnesses for the State testified that no taillights were visible on the truck. Defendant failed to place warning signals or flares at the back of his truck.

The other vehicle involved in the accident was a station wagon driven by Mr. Justin Merritt. Mr. Merritt testified that on the evening in question he was traveling with his family in a southerly direction in the right lane of Highway 132. He was traveling at approximately 55 miles per hour, and his headlights were on low beam. The disabled truck was invisible until it was "right in front" of Mr. Merritt. Mr. Merritt "jerked the [steering] wheel as hard as [he] could to the left" but was unable to avoid crashing into the truck. As a result of the accident three members of Mr. Merritt's family were killed.

The evidence offered by the defendant tends to show that he went to get gas, leaving behind a passenger to "direct the traffic." The passenger testified that he stood at the back of the truck "telling people to go around," and that eight or nine vehicles did so, but that after one car "almost hit" him, he got into the truck "to try and find something to help [him] direct traffic." While the passenger was in the truck the accident occurred. This passenger also testified that he observed lights on the back

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of the truck. The State's evidence tended to show that no one was observed near the truck attempting to "direct the traffic."

The evidence further showed that defendant's driver's license had been revoked, and that he was driving pursuant to a limited privilege, one of the conditions of which was that he not operate a motor vehicle within three days after consuming any alcoholic beverage. After the accident defendant was given a breathalyzer test on which he blew a .04 percent.

The jury found defendant guilty of three charges of involuntary manslaughter and one charge of operating a motor vehicle in violation of a limited driving privilege. The court imposed a prison sentence of three years on the count charging defendant with the involuntary manslaughter of Serena B. Merritt; on the count charging involuntary manslaughter of Emily Merritt, the court entered a judgment imposing a prison sentence of three years to run consecutively with the sentence imposed in the death of Serena B. Merritt; with respect to the case charging involuntary manslaughter of Martha J. Merritt and the case of operating a motor vehicle in violation of a limited driving privilege, the court entered a judgment imposing a prison sentence of three years, to run concurrently with that sentence imposed in the case involving the death of Emily Merritt. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General G. Criston Windham, for the State.

Fullwood & Morgan, by Ernest B. Fullwood, for the defendant, appellant.

HEDRICK, Judge.

Defendant assigns error to the denial of his timely motion for judgments as of nonsuit with respect to the charges of involuntary manslaughter. He contends that the evidence, when considered in the light most favorable to the State, is insufficient to show that the deaths of Serena Merritt, Emily Merritt, and Martha Merritt were proximately caused by the culpable negligence of the defendant.

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"The violation of a statute or ordinance, intended and designed to prevent injury to persons or property, whether done intentionally or otherwise, is negligence *per se*, and renders one civilly liable in damages, if its violation proximately result in injury to another. . . . Culpable negligence in the law of crimes is something more than actionable negligence in the law of torts." *State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933).

The violation of a safety statute which results in injury or death will constitute culpable negligence if the violation is wilful, wanton, or intentional. But, where there is an unintentional or inadvertent violation of the statute, such violation standing alone does not constitute culpable negligence. The inadvertent or unintentional violation of the statute must be accompanied by recklessness of probable consequences of a dangerous nature, when tested by the rule of reasonable prevision, amounting altogether to a thoughtless disregard of consequences or of a heedless indifference to the safety of others.

State v. Hancock, 248 N.C. 432, 435, 103 S.E. 2d 491, 494 (1958).

N.C. Gen. Stat. Sec. 20-161(a), (b) and (c) provides:

(a) No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway or highway bridge outside municipal corporate limits unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main-traveled portion of the highway or highway bridge.

(b) No person shall park or leave standing any vehicle upon the shoulder of a public highway outside municipal corporate limits unless the vehicle can be clearly seen by approaching drivers from a distance of 200 feet in both directions and does not obstruct the normal movement of traffic.

(c) The operator of any truck, trailer or semitrailer which is disabled upon any portion of the highway shall display warning signals not less than 200 feet in the front and rear of the vehicle. During daylight hours, such warning signals shall consist of red flags. During hours of darkness, such warning

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signals shall consist of red flares or reflectors of a type approved by the Commissioner of Motor Vehicles. Such warning signals shall be displayed as long as the vehicle is disabled.

N.C. Gen. Stat. Sec. 20-134 in pertinent part provides:

Whenever a vehicle is parked or stopped upon a highway, whether attended or unattended during the times mentioned in Sec. 20-129, there shall be displayed upon such vehicle one or more lamps projecting a white or amber light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle, and projecting a red light visible under like conditions from a distance of five hundred feet to the rear. . . .

N.C. Gen. Stat. Sec. 20-129(a) and (d) provides:

(a) When Vehicles Must Be Equipped.—Every vehicle upon a highway within this State during the period from a half hour after sunset to a half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person on the highway at a distance of 400 feet ahead, shall be equipped with lighted headlamps and rear lamps as in this section respectively required for different classes of vehicles, and subject to exemption with reference to lights on parked vehicles as declared in G.S. 20-134.

(d) Rear Lamps.—Every motor vehicle, and every trailer or semitrailer attached to a motor vehicle and every vehicle which is being drawn at the end of a combination of vehicles, shall have all originally equipped rear lamps or the equivalent in good working order, which lamps shall exhibit a red light plainly visible under normal atmospheric conditions from a distance of 500 feet to the rear of such vehicle. One rear lamp or a separate lamp shall be so constructed and placed that the number plate carried on the rear of such vehicle shall under like conditions be illuminated by a white light as to be read from a distance of 50 feet to the rear of such vehicle. Every trailer or semitrailer shall carry at the rear, in addition to the originally equipped lamps, a red reflector of the type which has been approved by the Commissioner and which is so located as to height and is so main-

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tained as to be visible for at least 500 feet when opposed by a motor vehicle displaying lawful undimmed lights at night on an unlighted highway. . . .

While the evidence, considered in the light most favorable to the State, is sufficient to raise an inference that the defendant was negligent in that he violated N.C. Gen. Stat. Secs. 20-161(a), (b), (c), 20-134, and 20-129(a) and (d), and that such negligence was a proximate cause of the deaths of Serena Merritt, Emily Merritt, and Martha Merritt, it is our opinion that the evidence is insufficient to raise an inference that such acts and omissions on the part of the defendant manifest a "wilful," "wanton" or "intentional" violation of the statutes, or a "heedless" and "thoughtless" indifference to the safety of others. We hold therefore that the trial judge erred in submitting the cases of involuntary manslaughter to the jury and his orders denying the motions as of nonsuit are reversed and the judgments entered on the verdicts must be vacated.

Although the defendant gave notice of appeal from the judgment imposed in the case wherein he was charged with a violation of N.C. Gen. Stat. Sec. 20-28(a), driving in violation of his limited driving privilege, he has not brought forward any assignments of error relating thereto; since the sentence imposed in this case exceeds that provided for in N.C. Gen. Stat. Sec. 20-179(b), however, the cause must be remanded to the Superior Court for resentencing for the offense of driving in violation of his limited driving privilege.

The result is: in the three cases charging involuntary manslaughter the sentences are vacated. In the case charging driving in violation of his limited driving privilege, we find no error in the trial, but the judgment is vacated and the cause is remanded for resentencing.

Judges BRASWELL and EAGLES concur.

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DONALD JOSEPH KELLER, EMPLOYEE, APPELLEE v. CITY OF WILMINGTON
POLICE DEPARTMENT, EMPLOYER; TRAVELERS INSURANCE COM-
PANY, CARRIER, APPELLANTS

No. 8210IC1323

(Filed 20 December 1983)

**1. Master and Servant § 68— workers' compensation—occupational disease de-
fined**

In order for a disease which is not specifically enumerated in G.S. 97-53 to be compensable as an occupational disease, the disease must be characteristic of a profession, peculiar to the occupation, and not an ordinary disease of life to which the general public is equally exposed, and there must be proof of causation between the injury and the employment. G.S. 97-53(13).

**2. Master and Servant § 68— workers' compensation—phlebitis not occupational
disease**

A patrol officer's phlebitis and resulting complications did not constitute an occupational disease where the evidence showed that phlebitis is not peculiar to the occupation of patrol officer but is peculiar to all occupations which require a great deal of sitting.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission entered 14 October 1982. Heard in the Court of Appeals 15 November 1983.

Hewlett & Collins by John C. Collins for plaintiff appellee.

*Crossley & Johnson by Robert W. Johnson for defendant ap-
pellants.*

BRASWELL, Judge.

During the course of his employment as a patrol officer for the City of Wilmington, the plaintiff developed phlebitis and, subsequently, pulmonary embolus. The plaintiff sought Workers' Compensation benefits which were originally denied by a deputy commissioner. Upon his appeal to the Full Industrial Commission, the plaintiff was awarded Workers' Compensation benefits on the grounds that the phlebitis and the resulting complications were occupational diseases. The defendants, contending that this award is error, have appealed.

The plaintiff first worked for the defendant-employer as a patrol officer in August of 1967 until he resigned in 1972. In August of 1977, he returned to work with the defendant-employer

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as a patrol and training officer. This work was comprised of ten-hour shifts with 80% to 85% of his time spent driving and riding in a patrol car.

On 2 November 1980, as the plaintiff jumped into his patrol car in response to a call, he experienced pain in his right leg. Thereafter, he began visiting a physician who diagnosed his illness as superficial phlebitis. In January of 1981, he developed deep vein phlebitis and was hospitalized in March of 1981 for pulmonary embolus.

In the hearing before the deputy commissioner, two medical experts testified. The defendants rely upon the testimony of Dr. Robert Rosati who was of the opinion that "this occupation does not unduly expose him [the plaintiff] to the risk of thrombophlebitis compared to the average individual," that this disease is an ordinary disease of life to which the general public would be equally exposed, and that phlebitis is not characteristic or peculiar to the plaintiff's employment. The plaintiff, on the other hand, called his treating physician, Dr. Durwood Almkuist, III, as a witness who testified that the plaintiff's occupation which required him to sit 80% to 85% of the time not only caused the plaintiff's phlebitis but also exposed him to a greater risk of contracting that disease than the public in general. Using Dr. Almkuist's testimony, the Full Commission reversed the deputy commissioner's Opinion and Award and allowed the plaintiff to recover workers' compensation benefits.

The scope of our review in a workers' compensation proceeding is whether the Commission's findings are supported by any competent evidence and whether its subsequent legal conclusions are justified by those findings. *Buck v. Proctor & Gamble Co.*, 52 N.C. App. 88, 278 S.E. 2d 268 (1981). The Commission's findings of fact are conclusive on appeal when supported by competent evidence, but the Commission's legal conclusions are subject to our review. See G.S. 97-86; *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980).

The plaintiff claims that he is entitled to workers' compensation benefits because he has contracted an occupational disease. Since phlebitis is not one of the diseases enumerated in G.S. 97-53, the plaintiff can only recover if phlebitis meets the re-

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quirements under the general definition found in G.S. 97-53(13). This provision states that an occupational disease is:

Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are *characteristic of and peculiar to a particular trade, occupation or employment*, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment. (Emphasis added.)

[1] Any case involving an interpretation of G.S. 97-53(13) necessarily involves a look at *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979), the North Carolina case containing the most comprehensive analysis of this section. In *Booker*, former Chief Justice Sharp outlines the four requirements present in G.S. 97-53(13). First of all, the disease must be "characteristic" of a profession. "A disease is 'characteristic' of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question." *Id.* at 472, 256 S.E. 2d at 198. Secondly, the disease must be "peculiar to" the occupation. In the present case, the plaintiff is a patrol officer so the disease must be shown to be peculiar to the occupation of patrolmen. Quoting *Glodenis v. American Brass Co.*, 118 Conn. 29, 40-41, 170 A. 146, 150 (1934), the *Booker* court states that "peculiar to the occupation" means that "'the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations . . . and is in excess of that attending employment in general.'" *Id.* at 473, 256 S.E. 2d at 199. The third and fourth requirements respectively provide that the disease must not be an ordinary disease of life "'to which the general public is *equally exposed* outside'" and that there must be a proof of causation between the injury and the employment. *Id.* at 475, 256 S.E. 2d at 200. G.S. 97-53(13).

In reviewing the Full Commission's Opinion and Award, we agree that there is competent evidence to support its findings of fact that phlebitis is characteristic of a patrol officer's profession. The plaintiff testified that the nature of his job required him to be seated 80% to 85% of the time during his ten-hour shift and other evidence was received that this amount of sitting was a cause of phlebitis. This evidence also supports the contention that there is a causal relationship between the disease and the employ-

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ment. Dr. Almkuist further testified that in his opinion the plaintiff's job made him more susceptible to contracting phlebitis than the general public. Because these findings are supported by competent evidence even though there is also contrary evidence, they are conclusive and binding on this Court. Thus, the plaintiff's evidence has proved the first, third, and fourth elements as required in *Booker*.

[2] However, the Commission's finding of fact that the disease is "peculiar to" the plaintiff's employment, the second *Booker* requirement, is not supported by competent evidence. In fact all the evidence given, even by the plaintiff's treating physician, indicates that phlebitis is not peculiar to the occupation of patrol officer, but rather is peculiar to all occupations which require a great deal of sitting whether the profession be that of a secretary, judge, or airplane pilot. For instance, when Dr. Almkuist was asked for his opinion explaining the reason for the plaintiff's illness, the following exchange occurred:

A. [Dr. Almkuist] I think sitting for long periods of time is a definite cause that would lead to phlebitis and pulmonary embolus in some cases. It is not the only cause but I think it is definitely one of the possibly many causes that can lead to this.

Q. [Plaintiff's counsel] In other words, it is your opinion that *an occupation* that requires you to spend 80 or 85 percent of the time either riding or driving an automobile, as in this particular case, is a very significant factor that he could have easily contracted phlebitis and further complications? (Emphasis added.)

A. [Dr. Almkuist] Yes, sir.

As the record before this Court reveals, the plaintiff offered no evidence through Dr. Almkuist's testimony or otherwise that phlebitis is peculiar to the occupation of patrol officer. In *Booker*, *id.* at 473, 256 S.E. 2d at 199, the Supreme Court emphasized that the occupation itself must create a hazard for the contraction of this disease greater than that found in the general run of occupations or from employment in general. Obviously, there is a risk in the general run of occupations that there may be much sitting required. The plaintiff's physician never states that phlebitis is

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peculiar to the occupation of patrol officer, but merely had a bearing on the development of this illness. The defendant's expert physician, Dr. Rosati, on the other hand, specifically asserts that in his opinion phlebitis does not have "any characteristics . . . peculiar to that occupation [patrol officer] which might cause the condition." Therefore, we hold the Commission's legal conclusion that the plaintiff's "phlebitis and pulmonary embolus were due to causes and conditions characteristic of and peculiar to his employment as a police officer" is based on a finding of fact not supported by competent evidence. Because G.S. 97-53(13) requires that the disease be peculiar to the occupation in question, the Commission's opinion and award must be reversed.

Reversed.

Judges ARNOLD and HILL concur.

MARVIN C. WHITLEY v. T. WORTH COLTRANE AND MARIANNE B. BELL,
EXECUTRIX OF THE ESTATE OF DEANE F. BELL, DECEASED

No. 8219SC1255

(Filed 20 December 1983)

1. Rules of Civil Procedure § 36— refusal to permit withdrawal of admission

In an action to recover on a promissory note, the trial court did not abuse its discretion in refusing to permit defendant to withdraw an admission of the genuineness of a surety's signature on the note which resulted from defendant's failure to answer plaintiff's request for an admission, especially where plaintiff's other competent evidence of the genuineness of the signature was unrefuted. G.S. 1A-1, Rule 36(b).

2. Evidence § 11.5— action on note— principal debtor's testimony as to deceased surety's signature— Dead Man's Statute

In an action on a promissory note, the principal debtor was not prohibited by the Dead Man's Statute, G.S. 8-51, from testifying that the deceased surety had executed the note sued on.

3. Evidence § 11.5— Dead Man's Statute— attorney for non-party affiant

An attorney for a non-party affiant is not an interested party for purposes of the Dead Man's Statute, G.S. 8-51.

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4. Rules of Civil Procedure § 56.3— summary judgment hearing—admissibility of affidavits

In an action by the assignee of a note against a surety thereon, affidavits by the original payee and her attorney met the requirements of G.S. 1A-1, Rule 56(e) and were properly admitted at the hearing on plaintiff's motion for summary judgment.

5. Bills and Notes § 20— action against surety—summary judgment for plaintiff

In an action against the surety on a promissory note, summary judgment was properly entered for plaintiff where plaintiff presented the principal obligor's verified answers to interrogatories stating that he observed the surety sign the original note, and defendant presented no evidence in rebuttal other than an unverified answer denying plaintiff's allegations.

APPEAL by defendant from *Seay, Judge*. Judgment entered 16 August 1982 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 21 October 1983.

Defendant Coltrane and the late Deane F. Bell allegedly executed a note in favor of Lucille King on 18 August 1978 in the amount of \$20,000. The loan of \$20,000 was to Coltrane, with Bell acting as surety on the note. \$1,778.08 was paid on the note. Plaintiff endorsed the note. On 6 April 1981, plaintiff paid \$20,000 to satisfy the note which was then assigned to him. On 28 August 1981, plaintiff, as holder of the note, sued defendants for the balance due plus interest. Defendant Marianne Bell, as executrix of the estate of Deane F. Bell, deceased, filed her answer on 3 November 1981.

On 20 November 1981, plaintiff served defendant Marianne Bell with a request for admissions, asking that she admit that the signature on the note was the signature of Deane F. Bell. Defendant Marianne Bell never responded to this request.

On 8 June 1982, plaintiff filed a motion for summary judgment, based on the pleadings, answers to interrogatories, requested admissions of fact, and affidavits of P. Wayne Robbins and Lucille King. A hearing on this motion for summary judgment was held on 16 August 1982. Defendant Marianne Bell moved to withdraw her admission based on her failure to respond to plaintiff's request for admission, claiming that she did "not have a record of ever having received said Request for Admissions and only discovered it had been filed while preparing for a hearing on plaintiff's Motion for Summary Judgment."

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The trial judge never ruled on this motion to withdraw the admission. At the conclusion of the hearing on plaintiff's summary judgment motion, the trial judge found that there was no genuine issue as to any material fact. From summary judgment granted in favor of the plaintiff for \$18,221.92 plus interest, defendant appeals.

Gavin and Pugh, by W. Ed Gavin, for plaintiff-appellee.

C. Richard Tate, Jr., for defendant-appellant.

EAGLES, Judge.

[1] Defendant first asserts that the trial judge should have allowed her to withdraw her admission that the signature on the note was in fact the signature of Deane F. Bell. She contends that her failure to answer plaintiff's request for admission, which resulted in an admission of the genuineness of the signature, occurred through mistake or inadvertence. We find that the trial judge committed no error in failing to grant defendant's motion to withdraw her admission.

We first note that Rule 36(b) of the North Carolina Rules of Civil Procedure provides that "the court may permit withdrawal" of the admission, making the ruling upon a motion to withdraw an admission discretionary with the trial court. A trial judge may or may not allow withdrawal of an admission, and we find here no abuse of that discretion.

[2] In any event, defendant's admission of the genuineness of the signature was superfluous in considering plaintiff's motion for summary judgment because plaintiff's evidence on the signature issue was unrefuted. Defendant Coltrane's verified answers to interrogatories stated that defendant Coltrane observed defendant Deane F. Bell sign the original note. Defendant Coltrane is not disqualified as a witness by G.S. 8-51, the "Dead Man's Statute." Although he was a principal obligor on the note and a party to the lawsuit, a principal debtor may testify that the deceased surety executed the instrument sued on. This special rule is based on the fact that the witness' interests are not affected; he remains liable notwithstanding. 1 Brandis, N.C. Evidence § 72 (2d rev. ed. 1982). Because plaintiff presented defendant Coltrane's competent evidence as to Deane F. Bell's execution of the note, defendant

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Marianne Bell can show no prejudice by the trial court's failure to grant her motion to withdraw her admission of genuineness of Deane F. Bell's signature.

Defendant's second assignment of error is that the trial court improperly considered the affidavits of Attorney P. Wayne Robbins and Lucille King in ruling on the motions for summary judgment. Rule 56(e) of the North Carolina Rules of Civil Procedure provides that affidavits in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." We find that the affidavits of Robbins and King met these requirements.

[3] The substance of the affidavit of Robbins was that he had represented Lucille King in a lawsuit against T. Worth Coltrane on the note, that he had discussed the matter with Deane F. Bell, and that he had "exhibited the note to Dean [sic] and he acknowledged that he had signed it as a favor to Mr. Coltrane." G.S. 8-51 does not disqualify Robbins as a witness, because Robbins is neither a party nor a person with "direct legal or pecuniary interest" in the outcome of the litigation so as to make him an interested party. 1 Brandis, N.C. Evidence § 69 (2d rev. ed. 1982). Because an attorney for one of the parties to a lawsuit is held not to be an interested party for the purposes of G.S. 8-51, the "Dead Man's Statute," it is abundantly clear that an attorney for a non-party affiant is not an interested party. See, *Propst v. Fisher*, 104 N.C. 214, 10 S.E. 295 (1889); *In re Simmons*, 43 N.C. App. 123, 258 S.E. 2d 466 (1979). Robbins' affidavit was based on personal knowledge and set forth facts that would be admissible into evidence in that the information was relevant to the issue of whether defendant Deane Bell had admitted signing the note.

[4] Both Robbins' and King's affidavits show that the affiants are competent to testify on this matter. Summary judgment may be granted, when otherwise appropriate, on the basis of the moving party's own affidavits if there are only latent doubts as to the affiant's credibility and when, as here, the nonmoving party has failed to come forward with material that raises a genuine issue of fact. *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 410 (1976). Neither of these affiants' credibility is suspect on the

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grounds of an interest in the outcome or because their testimony concerned matters of opinion involving a substantial margin for honest error. *Id.* at 366, 222 S.E. 2d at 408. We hold therefore that the affidavits of Robbins and King met the requirements of Rule 56(e) and were admissible at the hearing on plaintiff's motion for summary judgment.

[5] Defendant's final assignment of error is that the trial judge improperly granted summary judgment in favor of plaintiff. Defendant contends that plaintiff failed to present competent evidence to show that Deane F. Bell actually signed the note. We do not agree.

Summary judgment is proper when the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Rule 56(e) provides, *inter alia*:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

It is true that not every failure to respond to a motion for summary judgment will require the entry of summary judgment. The moving party must satisfy his burden of proving that there is no genuine issue of any material fact. *Kidd v. Early, supra*. However, when the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. *Frank H. Connor Co. v. Spanish Inns Charlotte, Ltd.*, 294 N.C. 661, 675, 242 S.E. 2d 785, 793 (1978).

As previously noted, plaintiff presented defendant Coltrane's verified answers to interrogatories, stating that defendant Coltrane observed Deane F. Bell sign the original note. Defendant Marianne Bell presented no evidence in rebuttal, beyond the mo-

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tion to withdraw her admission of the genuineness of the signature, which only repeated the denial of the allegations contained in her unverified answer. This did not present facts to controvert the evidence offered by plaintiff in support of his motion for summary judgment. The trial judge properly entered summary judgment in favor of plaintiff.

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. TONY LEVET SMITH

No. 8226SC1161

(Filed 20 December 1983)

Criminal Law § 111.1— necessity for special instruction on identification

In an armed robbery prosecution in which one victim's identification of defendant was the only real issue in the case, the trial court erred in failing to give defendant's requested instruction concerning the burden of proof of identification and factors the jury should consider in determining the reliability of the identification of defendant.

APPEAL by defendant from *Lewis, Robert D., Judge*. Judgment entered 14 May 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 April 1983.

Defendant was convicted of the armed robbery of a grocery store. The crime, which occurred February 16, 1982, was committed by two masked men and whether the defendant was one of them was the only real issue in the trial.

The testimony at trial was to the following effect: Hugh Houston and Patricia Roseboro were working at the grocery store when two men came in with dark scarves covering their faces from just under the eyes to below the mouth. One of the men also wore a toboggan that covered the top of his head and forehead to about an inch above the eyebrows, and had a sawed off shotgun. Though Houston did not know the defendant, he had seen him several times before either in the neighborhood or in the store, and he recognized the toboggan wearer as being the defendant.

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Houston was so sure he recognized defendant that when told that it was a holdup he thought it was a joke; but he changed his mind when the robber knocked him down with the sawed off shotgun. Houston then gave the robbers the money in the cash register and they left. Houston first described his assailant to the police as being 20 to 25 years old and 5 feet 11 inches high, but his testimony at trial was that defendant was only 5 feet 4 inches tall; however, Houston readily chose defendant's photograph from an array of six pictures shown to him by the police and he picked defendant out of a line-up as well. But Mrs. Roseboro, who told the officers shortly after the holdup that she would be able to identify the robbers if she saw them again, could not identify defendant from either the photographs or the line-up, and though present during the trial, she did not testify.

Attorney General Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Appellate Defender Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

PHILLIPS, Judge.

The defendant rests his hopes for a new trial upon the solitary contention that the trial judge's refusal to specially instruct the jury on the identity issue, as requested, was prejudicial error. His position is well taken.

In *State v. Kinard*, it was said:

Whether the identification issue is such a substantial feature of the case that the trial court is required to give instructions specifically dealing with the relevant factors involved in either a confrontation identification or photographic identification depends on the evidence in each case. If the evidence strongly suggests the likelihood of irreparable misidentification, the identification issue would become a substantial feature of the case, and the trial judge is required, even in the absence of a request, to properly instruct the jury as to the detailed factors that enter into the totality of the circumstances relating to identification.

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54 N.C. App. 443, 446, 283 S.E. 2d 540, 543 (1981). Though the circumstances of that case did not require that any special instruction be given, since two eyewitnesses testified, the subject wore no mask, and no other circumstances existed which made misidentification likely, the principle stated is nonetheless sound. Indeed, the soundness and importance of the principle was recognized by this Court earlier in *State v. Lang*, 46 N.C. App. 138, 264 S.E. 2d 821, *rev'd on other grounds*, 301 N.C. 508, 272 S.E. 2d 123 (1980), though again, a special identification instruction was not deemed obligatory since that defendant had not requested one. But in appropriate situations a number of courts, including the Fourth Circuit in *United States v. Holley*, 502 F. 2d 273 (4th Cir. 1974), have required jurors to be specially instructed on the identification issue. Properly so, we think. Because of their circumstances mistake is a strong possibility in some identification cases, and in such cases sound judicial principles require that the identification be accompanied by such practical safeguards as the law has devised to enhance its reliability.

This is such a case. In it the identification issue was not just a substantial feature of the State's case, it was the entire case. The only evidence linking defendant to the crime was the testimony of one witness, Houston, who first described the culprit as being 7 inches taller than defendant, even though he claimed to have seen defendant on previous occasions. The only other person present when the crime was committed had as good an opportunity to observe the criminals, but could not identify defendant as being one of them. And, of course, the identification problem, never entirely free of difficulty, even when the subject's face is clearly visible, was greatly compounded here, since most of the criminal's head and face was covered.

As many judges and psychologists have noted, "convictions based solely on 'one eyewitness' identifications represent 'conceivably the greatest single threat to the achievement of our ideal that no innocent man shall be punished.'" *United States v. Butler*, 636 F. 2d 727, 732 (D.C. Cir. 1980) (Bazelon, J. dissenting), *cert. denied*, 451 U.S. 1019, 69 L.Ed. 2d 392, 101 S.Ct. 3010 (1981). This, of course, is because the human mind often plays tricks on us. One of the tricks that it sometimes plays is that a person seen briefly before in one place and situation is thought, even by the keenest of us, to be another person, seen in a different context

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altogether. This common experience of mankind, known to social scientists as "unconscious transference," has been much discussed in their literature, and the likelihood of the experience being repeated under various circumstances has been confirmed by experiments of different kinds. For examples, see *Eyewitness Testimony*, by Stanford University Professor E. Loftus, Harvard University Press (1979), and *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, by Gorenstein and Ellsworth, *Journal of Applied Psychology*, Volume 65, pp. 616-622 (1980).

That in this case Houston, in good conscience, could have picked the defendant out of the line-up, not because he recognized him from the robbery, but because he looked familiar from being in the area earlier is certainly quite possible. In an effort to guard against the baleful effects of this possibility, the defendant submitted a requested jury instruction, which included the following:

I instruct you that the State has the burden of proving the identify [sic] of the defendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty.

The main aspect of identification is the observation of the defendant by the witness at the time of the events.

Examining the testimony of the witness, Hugh Houston, as to his observation of the perpetrator at the time of the crime, you should consider that the perpetrator was wearing a mask. However, your consideration must go further. The identification of the defendant by the witness, Hugh Houston, as the perpetrator of the offense must be purely the product of his recollection of the offender and derived only from the observation made at the time of the offense. In making this determination, you should consider the manner in which the witness was confronted with the defendant after the offense, the conduct and comments of the persons in charge of the investigation and any circumstances or pressures which may have influenced the witness in making an identification, and which would cast out upon or reinforce the accuracy of the witness' identification of the defendant.

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Under the peculiar circumstances of the case, this was a proper instruction, and from defendant's viewpoint, a necessary one. It would have directed the jury's attention to the possibility that defendant had been identified because he looked familiar to the witness from being seen earlier in the area, rather than because the witness remembered him from the crime. Since this instruction was crucial to defendant's case, the circumstances supported it, and it had been timely and properly requested, defendant was entitled to have the substance of it presented to the jury. *State v. Thomas*, 28 N.C. App. 495, 221 S.E. 2d 749 (1976). The instruction that the judge gave, though adequate for many other cases, failed to either address or deal with the misidentification possibility that the circumstances of the case raised. It also failed to note that the culprit had on a mask—another material aspect of defendant's case. Thus, a new trial is required.

New trial.

Judges HILL and JOHNSON concur.

JOSEPH J. ANDRIS, III v. LYNDIA B. ANDRIS

No. 8218DC1273

(Filed 20 December 1983)

1. Domicile § 1— showing required

In order to establish a domicile, a party must make a showing of both actual residence in the new locality and the intent to remain there permanently.

2. Divorce and Alimony § 1.1— action for divorce— sufficient evidence of domicile

The trial court in a divorce action properly found that plaintiff, a member of the United States Navy, is domiciled in North Carolina, although plaintiff does not own any real estate in North Carolina and does not maintain a separate residence in this State apart from that of his father, where the evidence showed that plaintiff changed his permanent address with the Navy to his father's address in Greensboro as of 1 August 1981; plaintiff changed his voter registration from Pennsylvania to Guilford County; plaintiff filed a North Carolina income tax return for the year 1981; plaintiff opened a bank account in Greensboro in August 1981 and has maintained it since that time; plaintiff has resided at his father's house whenever on leave from the Navy; plaintiff has changed the registration of his motor vehicle from Pennsylvania to North

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Carolina and has paid North Carolina property taxes; and plaintiff has severed all ties with the State of Pennsylvania.

3. Divorce and Alimony § 1.1— divorce action—jurisdiction over defendant—erroneous finding of no significance

Although the trial court erred in concluding it had jurisdiction over defendant's person when there had been no finding that she had any contacts with North Carolina, such error was harmless since G.S. 50-6 permits a divorce action based on a year's separation to be maintained in this State when either the husband or the wife has resided in the State for a period of six months; and the court found that plaintiff husband had resided in this State for the required time.

APPEAL by defendant from *Cecil, Judge*. Judgment entered 17 September 1982 in District Court, GUILFORD County. Heard in the Court of Appeals 25 October 1983.

Defendant appeals from the trial court's order denying her motion to dismiss for lack of jurisdiction over the person and subject matter. Plaintiff, a medical doctor serving in the United States Navy, filed for absolute divorce on 16 March 1982 in Guilford County on the grounds of continuous separation for more than one year. Before beginning active duty in 1980, he had lived in Pennsylvania for approximately 29 years. Plaintiff and defendant were married on 2 October 1975 in Pennsylvania and continued to live there until their separation in October of 1979. Defendant continues to live in Pennsylvania and has never resided in North Carolina.

Plaintiff's father and stepmother have lived in North Carolina since May of 1980. In August of 1981, plaintiff informed the Navy that he desired to have his father's address in Greensboro as his permanent address. During that same month, plaintiff obtained a North Carolina driver's license, registered a motorcycle with the North Carolina Department of Motor Vehicles, registered to vote in Guilford County, and opened a bank account in Greensboro. Plaintiff has also filed a North Carolina income tax return since that time. Plaintiff does not own any real estate in North Carolina and does not maintain a separate residence in North Carolina, apart from that of his father. However, plaintiff comes to his father's home whenever he is granted leave from the Navy.

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Defendant moved to dismiss plaintiff's complaint for lack of jurisdiction. Defendant contends, first, that plaintiff has failed to maintain a residence in North Carolina for at least six months prior to filing for a divorce as is required by G.S. 50-8 and, second, that there are insufficient minimum contacts between she and the State of North Carolina for the court to have properly obtained jurisdiction over her person. From the trial court's order denying that motion, defendant appeals.

Greeson & Turner, by Joseph E. Turner, for defendant-appellant.

McNairy, Clifford & Clendenin, by Locke T. Clifford, for plaintiff-appellee.

ARNOLD, Judge.

[1] In an action for a divorce in this state, either the plaintiff or defendant must have been "a resident of the State of North Carolina for at least six months next preceding the filing of the complaint. . . ." G.S. 50-8. The word "resident" has been interpreted to mean the equivalent of "domicile." *Williams v. North Carolina*, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279 (1942). See Lee, *North Carolina Family Law* § 42 (1979). In order to establish a domicile, a party must make a showing of both actual residence in the new locality and the intent to remain there permanently. *State v. Williams*, 224 N.C. 183, 29 S.E. 2d 744 (1944).

[2] In the case at bar, defendant contends that plaintiff has failed to establish a North Carolina domicile in that, although he may have the requisite intent, he has not proven actual residence in this state. We find that the trial court properly found that plaintiff is domiciled in North Carolina.

The evidence introduced at trial showed that: 1) plaintiff changed his voter registration from Pennsylvania to Guilford County, 2) plaintiff filed a North Carolina income tax return for the year 1981, 3) plaintiff changed his permanent address with the Navy to his father's address in Greensboro as of 1 August 1981, 4) plaintiff opened a bank account in Greensboro in August of 1981 and has maintained it since that time, 5) plaintiff has changed the registration of his motor vehicle from Pennsylvania to North Carolina and has paid North Carolina property taxes, 6) plaintiff

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has resided at his parent's house whenever on leave from the Navy, and 7) plaintiff has severed all ties with the State of Pennsylvania. In short, plaintiff has done everything possible to establish a residence in North Carolina. The transient nature of his career with the United States Navy prohibits him from doing anything further.

Defendant cites the case of *Martin v. Martin*, 253 N.C. 704, 118 S.E. 2d 29 (1961), to support her contention that plaintiff has not established a residence in North Carolina. In that case the court found that evidence that a United States Army officer stationed in North Carolina, who had registered his car and paid income tax in North Carolina and had obtained a North Carolina driver's license, was not conclusive on the question of legal residence, but was sufficient to be submitted to the jury. In addition, the court held that, in determining domicile for divorce actions, "mere presence is insufficient." 253 N.C. at 709, 118 S.E. 2d at 33.

The court's holding in *Martin* does not preclude a finding that the trial court properly concluded that plaintiff was domiciled in North Carolina. Plaintiff has established more than mere presence in this state. A finding that he failed to meet North Carolina residency requirements would, in effect, penalize plaintiff for having chosen a military career, since he has done everything possible to make this state his actual residence. We hold that the trial judge properly found that plaintiff is domiciled in North Carolina.

[3] Defendant also contends that the trial court erred in concluding that it had jurisdiction over her person when there had been no finding that she had any contact with North Carolina. We agree that the court improperly found jurisdiction over defendant, but find that this error was insignificant in that G.S. 50-6 allows a divorce proceeding "on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the *plaintiff or defendant* in the suit for divorce has resided in the State for a period of six months." (Emphasis added.) See *Fleek v. Fleek*, 270 N.C. 736, 155 S.E. 2d 290 (1967).

We hold that the order of the trial court denying defendant's motion to dismiss is

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Affirmed.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. JAMES WILLIAM HERALD

No. 8325SC297

(Filed 20 December 1983)

1. Criminal Law § 91— dismissal of charges—no speedy trial violation or prejudice

Where the State dismissed three felony charges against defendant, any speedy trial violation or prejudice resulting from those charges no longer existed.

2. Criminal Law § 91— voluntary dismissal of charges—no violation of speedy trial rights

The State's entry of voluntary dismissals of three felony charges against defendant pursuant to G.S. 15A-931 did not violate defendant's rights to a speedy trial since no indictments were left pending after the voluntary dismissals, and if the dismissed charges were later reinstated against defendant, he would then have standing to move for speedy trial relief. G.S. 15A-931; G.S. 15A-701(a1)(3).

APPEAL by defendant from *Griffin, Judge*. Order entered 4 November 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 15 November 1983.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

W. P. Burkheimer for defendant appellant.

ARNOLD, Judge.

The question raised by defendant is whether the trial court erred in dismissing his motion for speedy trial relief. The State raises the question of whether defendant's appeal from this order should be dismissed. Upon careful examination of the record on appeal, we conclude that dismissal of defendant's appeal is proper.

On 22 March 1982 defendant was arrested for breaking and entering with the intent to commit larceny. (82CR2091). On 11

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May 1982 he was arrested for burglary. (82CR3443). Two days later defendant was arrested on a second charge of breaking and entering with intent to commit larceny. (82CR3485). As to 82CR2091 and 82CR3443, defendant waived probable cause hearings in Caldwell District Court on 13 May 1982. He waived the probable cause hearing for 82CR3485 on 14 May 1982. All three cases were ordered for trial at the next criminal term of superior court. During the May 1982 district court proceedings defendant also pleaded guilty to breaking and entering a coin operated machine and was sentenced to two years. The court further found defendant in willful violation of his probation as to a prior case and ordered that the suspended two-year sentence be activated.

On 27 October 1982, defendant, through his court appointed attorney, moved for speedy trial relief. He alleged that on 13 and 14 May 1982 he pleaded guilty to various misdemeanor charges, waived probable cause hearings on the three felony charges and agreed to plead guilty to these felonies in superior court in exchange for the State's promise that he would receive concurrent two year sentences on each charge. Defendant further alleged that the district court judge approved this plea bargain and bound defendant over to superior court; that since 14 May 1982 defendant has been in custody on the misdemeanor convictions, but has been confined to a single cell and denied parole consideration because the three felony charges are pending; that since 14 May 1982 there have been seven terms of criminal superior court in Caldwell County; that at most of these terms defendant's attorney sought to have defendant brought before the superior court for sentencing pursuant to the plea bargain and that the State has not scheduled any of these cases in superior court during the 158 days since 14 May 1982.

Defendant alleged that the State's failure to bring these charges before the court prejudiced him in that he has been denied both parole consideration and his constitutional and statutory rights to a speedy trial.

After hearing arguments of counsel and reviewing the files, the trial court dismissed defendant's motion for speedy trial relief. The court found that it was unable to find any evidence of a plea arrangement; that the district attorney for the superior court was not notified of any of the allegations set forth in de-

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fendant's motion until it was filed on 27 October 1982; and that the defendant has not been indicted on the three felony charges. A stipulation was noted on this order that defense counsel had from time to time requested the District Attorney to place the matters on the calendar. The court concluded that the State had not delayed indicting defendant for any prejudicial purpose; and that defendant was not entitled to have the charges dismissed, the warrants quashed or the State enjoined from ever prosecuting him on said charges. This order was entered on 4 November 1982 and defendant gave notice of appeal in open court. Four days later the district attorney filed dismissals of the three charges and noted on each dismissal form that a bill was to be presented.

The defendant argues in his brief that he was denied his rights to a speedy trial on the felony charges because of the delay of at least 166 days from the date he was arrested until his motion was filed. G.S. 15A-701(a1)(1) of the Speedy Trial Act provides that the trial of a defendant who is arrested on or after 1 October 1978 and before 1 October 1983 shall begin "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs *last*. (Emphasis supplied.)" Defendant argues that in his case the 120 days began to run on the last date he was arrested, 14 May 1982. He emphasizes that he never waived indictments and was denied parole consideration because of the State's delay in bringing him to trial.

The State responds to this argument by emphasizing that since defendant has not been indicted on the felony charges, his statutory speedy trial rights have not been violated. The State has also moved for dismissal of defendant's appeal, because an order dismissing a motion for speedy trial relief is interlocutory and subject to dismissal. *See, State v. Black*, 7 N.C. App. 324, 172 S.E. 2d 217 (1970).

[1] This Court agrees that the appeal should be dismissed. Because the felony charges were dismissed against defendant in November 1982, any speedy trial violation or prejudice resulting from these charges no longer exists. Specifically, there are no pending charges on which defendant may be tried or which would exclude him from parole consideration. This Court has also been

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notified by the Clerk of Superior Court in Caldwell County that these charges have not been reinstated.

[2] We also find no basis for defendant's argument that the entries of voluntary dismissals pursuant to G.S. 15A-931 violate his rights to a speedy trial. Defendant argues that a voluntary dismissal is synonymous with the old system of "nolle prosequi with leave," which was declared unconstitutional by the United States Supreme Court. *Klopfer v. North Carolina*, 386 U.S. 213, 18 L.Ed. 2d 1, 87 S.Ct. 988 (1967).

Under a nolle prosequi with leave, the defendant was discharged without entering into a recognizance to appear at any other time. The statute of limitations remained tolled, however, with leave to reinstate the prosecution at a future date, since the indictment was not discharged. In finding this system unconstitutional the U. S. Supreme Court explained:

The pendency of the indictment (for criminal trespass committed by participation in a civil rights demonstration) may subject him (Klopfer) to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes.

Id. at 222, 18 L.Ed. 2d at 7, 87 S.Ct. at 993.

Under the present system of voluntary dismissals no indictment is left pending. G.S. 15A-931. Furthermore if the dismissed charges are later reinstated against defendant, then at this point he would have standing to move for speedy trial relief and could arguably give valid reasons for relief. His speedy trial rights would be governed, in part, by G.S. 15A-701(a1)(3). *See State v. Simpson*, 60 N.C. App. 436, 299 S.E. 2d 257 (1983) (interpreting G.S. 15A-701(a1)(3)). Presently defendant has no pending charges against him, and the appeal must be

Dismissed.

Judges HILL and BRASWELL concur.

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IN THE MATTER OF: WALTER W. CROUSE

No. 8321DC207

(Filed 20 December 1983)

1. Insane Persons § 1.2— commitment order—placing "X" beside recorded facts on form

An order of involuntary commitment was not void because the court recorded the facts by placing the letter "X" by the recorded facts on the order of commitment form. G.S. 122-58.7.

2. Insane Persons § 1.2— involuntary commitment—dangerousness to self

Reports of psychiatrists indicating the respondent was paranoid, destructive, and potentially dangerous were sufficient to support the court's determination that respondent was dangerous to himself.

3. Insane Persons § 1.2— involuntary commitment—necessary findings

An involuntary commitment order need not be supported by a specific finding of probability of serious physical debilitation resulting from the lack of self-caring ability.

Judge EAGLES dissenting.

APPEAL by respondent from *Harrill, Judge*. Order entered 18 November 1982 in District Court, FORSYTH County. Heard in the Court of Appeals 26 October 1983.

The respondent appeals from an order in an involuntary commitment proceeding.

On 8 November 1982, petitioner (respondent's mother) initiated a proceeding for involuntary commitment pursuant to G.S. 122-58.3. Petitioner alleged that the respondent "is a mentally ill or inebriate person who is dangerous to himself or to others." The following facts were set forth as the basis for petitioner's opinion:

"[Respondent has] become deeply involved in religion. In the recent past was seclusive part of the time; hostile and raging at other times. Speech is pressured. Measures every coming event in days, hours, and minutes. This morning he screamed out, as he often does, and began to act so bizarrely that officers were called out. He was babbling incoherently, raging, hostile. Was trembling, fists were clenched, and he was ready to violently explode. Petitioner believes he is po-

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tentially violent and unable to exercise judgment required to provide for his needs of safety and self-protection."

On the basis of this petition, the Assistant Clerk of Superior Court directed that respondent be taken into custody and held for examination by a qualified physician. Respondent was examined by two physicians who gave their opinion that respondent was mentally ill and was imminently dangerous to himself or others.

Respondent's case was heard in district court on 18 November 1982. Respondent was represented by counsel. The testimony of petitioner and the medical reports of the two physicians were introduced into evidence. The court found that respondent was mentally ill and dangerous to himself or to others. This finding was indicated by a mark in the appropriate space on the standard form denominated "Order in Involuntary Commitment Proceeding." In a similar fashion, the court indicated on the form that its finding was supported by the fact that respondent has recently "acted in such a manner as to evidence that he would be unable without care, supervision and the continued assistance of others to: satisfy his need for nourishment, personal or medical care, shelter, safety and protection." As evidence supporting these facts, the court incorporated by reference the medical reports of the examining physicians.

Respondent was committed for outpatient care at the Forsyth/Stokes Mental Health Clinic for a period not to exceed ninety days. From the entry of the order of commitment, respondent appealed.

Attorney General Edmisten, by Associate Attorney Barbara P. Riley, for the State.

Sparrow and Bedsworth, by George A. Bedsworth, for respondent appellant.

WEBB, Judge.

[1] In his first assignment of error the respondent contends that the commitment order is void on its face because the court did not record facts to support the order as required by G.S. 122-58.7. He says this is so because the court recorded the facts by placing the letter "x" in the boxes on the commitment order form beside

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the facts and other findings it made. He says this violates the rule of *In re Jacobs*, 38 N.C. App. 573, 248 S.E. 2d 448 (1978). It is true that case states that "Merely placing an 'X' in the boxes on the commitment order form does not comply with the statute." We believe this is dictum. This Court in that case did not state what findings the district court had made but said they were essentially identical to the findings made in *In re Koyi*, 34 N.C. App. 320, 238 S.E. 2d 153 (1977). This Court held in *Koyi* the recorded facts were not sufficient. Since the recorded facts were not sufficient to support an order of commitment, we do not believe the statement as to the insufficiency of placing an "x" on the commitment order form was necessary to the decision in *Jacobs*. We do not believe this case should be reversed because the court recorded the facts by placing "x's" by the recorded facts on the order of commitment form.

[2] The respondent also contends that there was not sufficient evidence for the court to find he was dangerous to himself. His mother testified as to the matters she had alleged in the petition. One of the psychiatrists stated that a finding of imminent danger to respondent could be based on "officers report anger, destruction, running away . . . potentially dangerous 2nd to paranoia." The other psychiatrist stated "the patient is now on medication, which may explain part of his 'reasonableness' but seems so lacking in judgment and/or having such a need to deny his behavioral excesses after the fact that the next 'explosion' even further fueled by anger over being sent here . . . could well cause injury to others." The court could conclude from the reports of the psychiatrists that the respondent is paranoid, destructive, and potentially dangerous. We believe this supports the findings of the district court.

[3] The respondent, relying on *In re Crainshaw*, 54 N.C. App. 429, 283 S.E. 2d 553 (1981), argues that the district court should be reversed because it did not make a "specific finding of probability of serious physical debilitation resulting from . . . lack of self-caring ability." It is true that *Crainshaw* contains language to the effect that such a finding is necessary but we believe this is dictum and not binding on this panel. *Crainshaw* held that the evidence did not support a finding of dangerousness to self or others, and we believe the holding of that case should be limited to this. G.S. 122-58.7(i) says that an inpatient commitment order

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may be supported by a finding "that the respondent is mentally ill . . . and dangerous to himself." We do not believe we should hold a finding in addition to this should be required to support a commitment order. Some of the language of *Crainshaw* would require it but we do not believe that language was necessary to a decision in the case and is not the holding of the case.

The respondent was committed for outpatient care. Since the court made findings which would support a commitment for inpatient care, we believe this supports an order for outpatient treatment.

Affirmed.

Judge PHILLIPS concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I dissent. Reversal of the order of the district court is required by our court's decision in *In re Jacobs*, 38 N.C. App. 573, 248 S.E. 2d 448 (1978), holding that "merely placing an 'X' in the boxes on the commitment order form does not comply with the statute," or alternatively, by our court's decision in *In re Crainshaw*, 54 N.C. App. 429, 283 S.E. 2d 553 (1981), mandating a "specific finding of probability of serious physical debilitation resulting from the more general finding of lack of self-caring ability."

The majority inappropriately characterizes the requirements laid down in *Jacobs* and *Crainshaw* as mere dictum which may be disregarded at will by subsequent panels of this court. I respectfully disagree.

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STATE OF NORTH CAROLINA v. RODNEY ALONZO YOUNG

No. 8312SC312

(Filed 20 December 1983)

Criminal Law § 85.2— character evidence—opinion testimony—specific acts

The trial court erred in permitting the prosecution to ask a character witness his opinion as to defendant's reputation for truthfulness and honesty and in permitting the witness to testify about specific acts of the defendant.

APPEAL by defendant from *Britt, Samuel E., Judge*. Judgment entered 18 November 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 November 1983.

In June, 1982, the Audio Barn in Fayetteville was entered through a window, the glass of which had been knocked out by a brick, and various articles were stolen. A trail of blood from the shattered windowpane led police to the home of Rinaldo Taylor, who had several of the stolen articles. Taylor implicated the defendant, a 17-year-old high school student, and so testified at trial; defendant and his parents testified he did not leave home the night of the crime and witnesses as to his character testified for both defendant and the State in rebuttal. Defendant was convicted of breaking or entering and larceny, and was sentenced to prison for three years.

Attorney General Edmisten, by Special Deputy Attorney General Daniel C. Oakley, for the State.

Beaver, Holt & Richardson, by William O. Richardson, for defendant appellant.

PHILLIPS, Judge.

Since no physical evidence tied defendant to the crime and he denied being involved, the case largely hinged on the credibility of the defendant and that of his alleged accomplice, Rinaldo Taylor. To bolster defendant's credit with the jury, a neighbor lady of standing, who had followed him closely since he was a child, testified that his reputation in the community where he lived was good and he was well regarded for his industry, good behavior and reliability. In rebuttal, the State undertook to show

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that defendant had a bad reputation, and the way that was done requires that defendant be given a new trial.

The State's character witness was the principal of the high school defendant attended. After the witness affirmatively answered the foundation question, testifying thereby that he knew the defendant's general character and reputation "as it exists around Westover Senior High School," instead of asking him what that reputation was, the State, in an apparent attempt to elicit information about specific misdeeds, began questioning him about how his knowledge was acquired. The questions were not clearly phrased, however, and after the witness either failed to answer at all, or did so unresponsively, the trial judge intervened as follows:

Court: Based upon your knowledge of him in the school and the environment of the school do you have an opinion satisfactory to yourself as to the character and reputation in that environment?

A. Yes, I do.

Court: All right. Now, what is it, good, bad, indifferent or what would it be if you have such an opinion?

A. My opinion is that—

Ms. Best: Objection and move to strike.

Court: Denied. What is his character and reputation in the school where he goes?

A. Rodney Young has exhibited on several occasion—

Court: —I didn't ask you that. The objection is sustained.

Upon the questioning being resumed by the State, the following occurred (in between overruled objections and motions to strike):

[Q.] Doctor Shipp, based on your familiarity with Rodney do you have an opinion as to his reputation for truthfulness and honesty within the school community?

A. Yes.

. . . .

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Q. What is that opinion as to his reputation within the school community for truthfulness and honesty.

A. Rodney does not tell the truth often to the administration and to me personally.

Though the words "the administration" were stricken from the last answer, the rest of the testimony was also inadmissible for several reasons. First, without considering whether it was appropriate under the circumstances for His Honor to undertake to facilitate the presentation of the State's case, the course embarked upon by the court and thereafter followed by the State was certainly incorrect. A witness's opinion about the character of another is inadmissible under our law, and questions calling for such an opinion should not have been either submitted or permitted by the court. As innumerable decisions of this Court and our Supreme Court attest, the only approved manner for getting such testimony into evidence is for a knowledgeable witness to testify as to the subject's reputation in the community. *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1978); *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972). Second, the follow-up questions by the State were doubly improper—first because they repeated the opinion error, and second because they asked the witness on direct examination about specific traits of character, which our law does not permit. *State v. McCormick*, 298 N.C. 788, 259 S.E. 2d 880 (1979). Finally, the last answer should have been stricken in its entirety for still another reason. Despite the latitude that the form of the question improperly permitted, the answer was not responsive—the opinion of the witness was not stated, about anything; nor was defendant's reputation for truthfulness and honesty mentioned. Instead, the answer was only about *specific acts* of the defendant, which character witnesses are not permitted to present during direct examination. 1 Brandis N.C. Evidence § 110 (2d rev. ed. 1982).

That the evidence involved was prejudicial to defendant is too plain for debate. In the setting that existed it could not have been otherwise.

New trial.

Judges WEBB and WHICHARD concur.

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STATE OF NORTH CAROLINA v. GARY G. COOK

No. 8323SC217

(Filed 20 December 1983)

1. Criminal Law § 99.3— court's remark not expression of opinion

In an attempted robbery case in which the court stated that an officer's testimony "will be received for the corroboration of a prior witness, if it does, and if it doesn't the court will rule it out," failure of the trial judge thereafter to mention the testimony or to instruct that it was for the jury to decide whether the testimony was corroborative did not amount to an endorsement of the testimony as corroborative in violation of G.S. 15A-1222.

2. Criminal Law § 138— aggravating circumstance—prior conviction—statement by counsel

A statement by defense counsel that defendant was then serving a nine-year sentence because of a conviction in Forsyth County was sufficient to support the court's finding as an aggravating factor that defendant had a prior conviction punishable by more than 60 days' confinement. G.S. 15A-1340.4(e).

APPEAL by defendant from *Mills, Judge*. Judgment entered 26 August 1982 in Superior Court, YADKIN County. Heard in the Court of Appeals 26 October 1983.

Defendant was found guilty of attempted robbery with a dangerous weapon and sentenced to prison for a term of twenty years. The State's evidence tended to show that: Defendant went to the home of Robert Munday, a 71-year-old retiree, and asked to borrow money, which Munday said he didn't have; while there defendant moved a pillow on the bed, saw a gun under it, grabbed it, pointed it at Munday, and told him he would shoot if the loan wasn't received; Munday grabbed defendant, took the gun away from him, and ran him off; a few minutes later defendant returned with a pipe wrench in his hand, whereupon Munday got his shotgun and ran him off again. Two weeks or so later, Mitchell Davis, a deputy sheriff, heard about the incident, questioned Munday, and defendant was arrested.

Attorney General Edmisten, by Special Deputy Attorney General Jo Anne Sanford, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Ann B. Peterson, for defendant appellant.

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PHILLIPS, Judge.

Two acts by the trial judge are asserted as error—one a comment in regard to certain corroborating testimony, the other imposing a longer sentence than the presumptive one for the offense involved. Neither amounted to legal error in our opinion.

[1] When the deputy sheriff undertook to testify to Munday's statement to him about the incident involved, the defendant objected and the trial judge stated: "[T]his will be received for the corroboration of the prior witness, if it does, and if it doesn't the court will rule it out." Thereafter, the judge made no allusion at all to the testimony that was given, which did tend to corroborate the previous witness, Munday. The defendant contends that the judge's silence amounted to an endorsement of the testimony as corroborative, contrary to G.S. 15A-1222, and that as a consequence defendant is entitled to a new trial. In our view it was a harmless oversight that had no perceptible effect, adverse or otherwise, on the verdict that the jury arrived at.

Under our law a witness can be corroborated by testimony as to prior consistent statements even though the witness has not been impeached. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979); 1 Brandis N.C. Evidence § 51 (2d ed. 1982). When the testimony was offered it was not known whether Munday's statements to the officer were consistent with his testimony, and the trial judge's remark was but in recognition of his duty to exclude the testimony if the statements were not consistent. *State v. Bagley*, 229 N.C. 723, 51 S.E. 2d 298 (1949). Though after the testimony was received the better practice certainly would have been to instruct the jury that whether it was corroborative was for them to decide, the failure to do so did not prejudice the defendant in our opinion. While under some circumstances silence can, indeed, be equivalent to speech, as defendant contends, not every unapt statement by a judge during the course of trial entitles the defendant to a new trial. A new trial is required only when the judge's remarks prejudice the defendant. *State v. Faircloth*, 297 N.C. 388, 255 S.E. 2d 366 (1979). In the setting that existed below, with the testimony being clearly and indisputably corroborative, and with the jurors knowing from the court's general instructions that they were the sole triers of fact, we do

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not perceive that the verdict was affected by either the judge's remarks or his silence.

[2] Under G.S. 15A-1340.4(f) the presumptive sentence for the Class D felony that defendant was convicted of is twelve years. In imposing a sentence of twenty years, the judge relied upon a finding that defendant had a prior conviction punishable by more than sixty days confinement. Defendant contends that the prior conviction finding was based only upon the prosecutor's oral statement and was therefore improper under G.S. 15A-1340.4(e), which states:

A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.

The record reveals, however, that during the sentencing hearing, defendant's attorney stated that defendant was then serving a nine-year sentence because of a conviction in Forsyth County. In our judgment, this statement by counsel was binding on defendant as a stipulation and no further proof of defendant's prior conviction was required. Furthermore, since it has been held that the methods of proof recited in G.S. 15A-1340.4(e) are not exclusive and that a previous conviction can be proven in other ways, *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982), counsel's statement was proof enough of the fact involved, even if it was not a stipulation in the technical sense.

No error.

Judges WEBB and EAGLES concur.

WILLIAM RHYNE COOK v. TASIA GARDELIS PONOS

No. 835SC47

(Filed 20 December 1983)

Automobiles and Other Vehicles § 80.1— striking turning vehicle—contributory negligence—jury question

While the evidence raised an inference that plaintiff motorcyclist was negligent in that he exceeded the speed limit, he passed another vehicle on the

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right in a "parking lane," and he failed to keep a proper lookout, a jury question was presented as to whether any or all of these acts or omissions on the part of plaintiff was a proximate cause of a collision between plaintiff's motorcycle and a vehicle which made a left turn across his lane of travel.

APPEAL by plaintiff from *Barefoot, Judge*. Judgment entered 20 August 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 6 December 1983.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries resulting from a collision between a motorcycle operated by plaintiff and an automobile operated by defendant in an allegedly negligent manner.

At the close of plaintiff's evidence the court allowed defendant's motion for a directed verdict, made under Rule 50, North Carolina Rules of Civil Procedure. The court concluded as a matter of law that "plaintiff was guilty of contributory negligence in causing the accident which is a bar to any recovery by him in this action."

Plaintiff appealed.

Goldberg & Anderson, by Frederick D. Anderson, for the plaintiff, appellant.

Crossley & Johnson, by John F. Crossley, for the defendant, appellee.

HEDRICK, Judge.

The sole question raised by plaintiff on appeal is whether the court erred "in entering judgment in favor of defendant at the close of plaintiff's evidence upon the ground of contributory negligence as a matter of law on the part of plaintiff."

Defendant's motion for a directed verdict on the ground of contributory negligence was properly granted only if "plaintiff's evidence, taken as true and interpreted in the light most favorable to plaintiff, so clearly shows [plaintiff's] negligence to have been a proximate cause of [the accident] that it will support no other conclusion as a matter of law." *Neal v. Booth*, 287 N.C. 237, 241, 214 S.E. 2d 36, 39 (1975). Even when the evidence establishes negligence *per se*, the question whether such negligence was the proximate cause of plaintiff's own injuries is ordinarily one for

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the jury. *Furr v. Pinoca Volunteer Fire Dept.*, 53 N.C. App. 458, 281 S.E. 2d 174, *disc. rev. denied*, 304 N.C. 587, 289 S.E. 2d 377 (1981). "Negligence bars recovery only if it is a proximate cause of the injuries complained of; otherwise, it is of no legal importance." *Bigelow v. Johnson*, 303 N.C. 126, 131, 277 S.E. 2d 347, 351 (1981). "When conflicting inferences of causation arise from the evidence, it is for the jury to determine from the attendant circumstances what proximately caused the injuries complained of," and entry of a directed verdict in such a case is error. *Id.* at 132, 277 S.E. 2d at 351 (citations omitted).

In the instant case the evidence, taken in the light most favorable to the plaintiff, shows the following: On 13 August 1980 plaintiff was operating a motorcycle in the northbound "outside travel lane" of U.S. Highway 421, outside Wilmington. That portion of the highway on which plaintiff was traveling has four travel lanes and a center turn lane, and it is bordered on each side by a "parking lane." Plaintiff was traveling approximately forty miles per hour, the speed limit, as he approached the point where the accident occurred. Approximately 150 to 200 yards south of the point of collision plaintiff passed a car. Plaintiff exceeded the legal speed limit in passing this vehicle, and he passed the car on the right, by moving his motorcycle into the "parking lane." Confronted with a truck parked in this lane, plaintiff quickly returned to the "outside travel lane," in front of the car he had just passed. After he passed the car and returned to the travel lane, approximately 250 feet from the point of collision, plaintiff saw for the first time the car driven by defendant. Defendant, who had been traveling in a southerly direction on Highway 421, had stopped her car partially in the turn lane and partially in the southbound inside travel lane in preparation for a left turn into a service station driveway on the east side of Highway 421. When plaintiff was approximately one hundred feet from the driveway, the defendant's car began to turn, thus obstructing the lane in which plaintiff was traveling. Plaintiff attempted to avoid the collision, but was unable to do so.

While this evidence raises an inference that plaintiff was negligent in that he exceeded the speed limit, and that he passed another vehicle on the right, in what he himself denominated a "parking lane," and that he failed to keep a proper lookout, it is

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for the jury to say whether any or all of these acts or omissions on the part of plaintiff was a proximate cause of the collision.

The evidence adduced at trial fails to so clearly establish that plaintiff's own negligence was a proximate cause of his injuries as to "support no other conclusion as a matter of law." We thus find that the court erred in directing a verdict for defendant, and remand the cause to the Superior Court for a new trial.

Reversed and remanded.

Judges BRASWELL and EAGLES concur.

JOSEPH MALCOLM BROWNE v. ROBERT J. MACAULAY AND NASH
GENERAL HOSPITAL

No. 837SC3

(Filed 20 December 1983)

**Hospitals § 3.2; Physicians, Surgeons and Allied Professions § 20— failure to keep
bedrails up—no proximate cause of injury**

In an action to recover damages for a fractured hip sustained by the 78-year-old plaintiff in a fall while he was a patient of defendant physician in defendant hospital, the trial court properly granted defendants' motions for directed verdicts at the close of plaintiff's evidence since, even if defendants had a duty to plaintiff to keep his bedrails up at night, the proximate cause of plaintiff's fall was not the breach of that duty but was plaintiff's own decision to request that the bedrail be left down on the night he was injured so that he could freely move to the bathroom and plaintiff's attempt to change his pajama bottom.

APPEAL by plaintiff from *Winberry, Judge*. Judgment entered 12 October 1982 in NASH County Superior Court. Heard in the Court of Appeals 30 November 1983.

Plaintiff brought suit to recover damages for a fractured hip that he sustained in a fall while he was a patient at defendant hospital.

Plaintiff's evidence tended to show the following. Plaintiff, a seventy-eight-year-old man, was admitted to defendant hospital on 20 November 1978. Defendant Macaulay was his physician. Plain-

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tiff suffered from severe, chronic constipation and was admitted to the hospital for tests. Plaintiff's wife told defendant Macaulay about her husband's tendency to walk at night, that he had recently fallen and had suffered a broken hip in another fall. She asked defendant Macaulay to take necessary action to ensure that her husband's bedrail was kept up at night. Defendant Macaulay told plaintiff's wife that he would enter an order on plaintiff's chart concerning the bedrails, but no entry was made. Mrs. Browne regularly requested hospital staff nurses to see to it that plaintiff's bedrails were put up at night.

On 26 November 1978, plaintiff got out of bed shortly after midnight to go to the bathroom. His right bedrail was down. He used the toilet to urinate. In that process, he wet his pajama bottom. He then attempted to remove his pajama bottom, and at that point, tripped and fell, fracturing his hip.

Plaintiff could not remember having any discussion with hospital personnel about his bedrails or the use of a bedside buzzer to obtain assistance in going to the bathroom. Hospital records indicated that plaintiff refused to allow his right bedrail to be put up on the night of his injury because he anticipated the need to use the bathroom during the night. Plaintiff had made his way to the bathroom on previous occasions without need of assistance.

The trial court granted defendants' motions for directed verdicts at the close of plaintiff's evidence. Plaintiff appealed.

Pritchett, Cooke & Burch, by Stephen R. Burch and William W. Pritchett, Jr., for plaintiff.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., and Steven M. Sartorio, for defendant Robert J. Macaulay.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay, Alene M. Mercer, and Theodore B. Smyth, for defendant Nash General Hospital, Inc.

WELLS, Judge.

The standard for ruling on a motion for a directed verdict is well known and need not be restated here. See, e.g., *Manganello*

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v. Permastone, Inc., 291 N.C. 666, 231 S.E. 2d 678 (1977); *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982). We note that, in clear violation of the provisions of G.S. § 1A-1, Rule 50(a) of the Rules of Civil Procedure, no specific grounds for the motion were stated by defendants. While plaintiff did not object to this deficiency, and we must therefore pass upon the trial court's ruling, we are constrained to note that this deficiency on such motions is not rare and that such lack of compliance with the rule unduly complicates the process of appellate review. For instance, in this case it appears that the trial court could have granted the motion either because plaintiff failed to establish a violation of a duty of care owed plaintiff by defendants; or plaintiff failed to show that defendants' alleged negligence was the proximate cause of plaintiff's injury; or that if defendants were negligent and proximate cause was shown, plaintiff was contributorily negligent as a matter of law.

At the threshold of every action for negligence is the plaintiff's burden of showing that the defendant has failed to exercise due care in the performance of some legal duty owed by the defendant to the plaintiff under the circumstances in which they were placed. The next requisite in negligence cases is for the plaintiff to show that such negligent breach of duty was the proximate cause of plaintiff's injury. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972).

In the case before us, if defendants had a duty to plaintiff to keep his bedrails up at night, it was not the breach of that duty which proximately caused plaintiff's injury. Plaintiff's own decision to request that his bedrail be left down on the night he was injured, so that he could freely move to the bathroom, and plaintiff's ill-fated attempt to change his pajama bottom were the proximate causes of his unfortunate injury. For these reasons, defendants were entitled to a directed verdict.

No error.

Judges WEBB and WHICHARD concur.

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CLYDE M. PENLEY v. BETTY ROBERTS PENLEY AND HAMBURG VALLEY, INC.

No. 8228SC1195

(Filed 3 January 1984)

1. Corporations § 16— stock subscription—necessity for writing

An oral agreement between plaintiff and defendant prior to the filing of the articles of incorporation that plaintiff would be entitled to 48% of the corporation's stock once the corporation was formed was a preincorporation subscription agreement, and pursuant to G.S. 55-43(b), the agreement was not enforceable because it was not in writing. G.S. 55-46(a)(2), G.S. 55-43(h) and G.S. 55-56(a).

2. Corporations § 4.1— preincorporation agreement as agreement to incorporate—necessity of a writing

An oral agreement prior to incorporation of a business which attempted to settle each party's percentage of stock in the corporation could have been considered a shareholders' agreement pursuant to G.S. 55-73(b); however, the agreement was unenforceable since G.S. 55-73(b) requires the agreement to be in writing.

3. Contracts § 4.2— oral agreement unenforceable—not based on valuable consideration

An oral preincorporation agreement between plaintiff and defendant which indicated plaintiff would be entitled to 48% of the corporation's stock once the corporation was formed was not enforceable because the agreement was not based on valuable consideration. The evidence indicated that plaintiff-husband began working more hours at defendant-wife's Kentucky Fried Chicken business once defendant-wife became ill with cancer; that plaintiff-husband agreed to work full time after an initial period only after the defendant-wife begged and cried at great length; there was no bargained-for exchange that plaintiff would receive an interest in defendant's business in consideration of his leaving his own business; that plaintiffs never discussed the ownership of the Kentucky Fried Chicken business; and that plaintiff testified that "[w]hen we separated she wanted me out of the business, and I tried three or four reasonable ways to get out of the business and to get into something else that I could do." This testimony and the circumstances of his wife's cancer under which he entered the business full time demonstrated that plaintiff's interest in the business evolved from his status as husband, and not as a business partner.

4. Declaratory Judgment Act § 1— oral agreement—relief under Declaratory Judgment Act improper

Because a parties' preincorporation agreement was oral and its enforceability had not been proved, relief under the Declaratory Judgment Act was improper. G.S. 1-253, *et seq.*

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5. Limitation of Actions § 4.6— contract action— three-year statute of limitations

Plaintiff's contract action was barred by the three-year contract statute of limitations imposed by G.S. 1-52(1) where the complaint was filed 11 August 1981, which ordinarily would be the date to which to look for the running of the statute of limitations, the parties, by stipulation, established 27 March 1981 as the cutoff date, and plaintiff's cause of action accrued on 5 January 1978.

Judge BECTON dissenting.

APPEAL by defendants from *Friday, Judge*. Judgment entered 2 July 1982 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 30 September 1983.

Barnes, Wadford, Carter & Kropelnicki by Steven Kropelnicki, Jr., for plaintiff appellee.

Elmore & Powell by Bruce A. Elmore, Jr., for defendant appellants.

BRASWELL, Judge.

The present case in a nutshell concerns the struggle between a now divorced couple over the ownership of a Kentucky Fried Chicken business in Hendersonville. The plaintiff-husband claims he is entitled to 48% of the business which has now been incorporated. He has sued his wife and the corporation in which he allegedly has an interest. At trial the jury, responding to the only issue placed before them, found that the plaintiff was indeed entitled to ownership of 48% of the stock of the business. The defendant-wife based on twenty-six assignments of error appeals from the judgment entered against her. Finding error, we reverse.

In 1949, the plaintiff and the defendant-wife were married. The plaintiff opened up a tire business with his brother in Weaverville, North Carolina, in 1965. The defendant-wife, also in 1965, obtained a Kentucky Fried Chicken franchise in Hendersonville, North Carolina, from Colonel Sanders himself whom she knew personally. Originally, the defendant-wife's sister-in-law, Emily Roberts, was a partner in the business, but because of certain disputes over money in 1967, she left the business.

During this time in 1967, the defendant-wife developed cancer and with her sister-in-law's absence needed help in the

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business. The defendant-wife asked the plaintiff who was her husband at the time if he would help her, and after much convincing, he agreed. The plaintiff did not initially close his tire business, but as he began to work longer hours in Hendersonville gave his interest in the tire business to his brother.

At the time the plaintiff came to help his wife in the chicken business, he testified that they had no discussion about the ownership of the business, but that she promised that if he helped her they would save all the money they could. As husband and wife, they had always used and enjoyed the other's property no matter who was legal owner. When the plaintiff agreed to help the defendant-wife in her business, she indicated that they would continue to share everything including "the money, the profits and the business, anything they did."

The plaintiff stated on direct examination that he handled the social security, the unemployment, and the time records while the defendant-wife managed the money, the taxes, the banking, and the bills. He revealed that "I gave her the money, and she would give me what I had to have. And she would get the rest."

Both parties agreed that no partnership tax returns were ever filed, and that social security and unemployment were taken out on the plaintiff. Also, the information furnished by the plaintiff on the 1976 tax return filed on the business indicated that the plaintiff earned a salary of \$10,400 as an employee and that the defendant-wife as the owner showed a profit of \$65,000.

Prior to 1977, the defendant-wife decided that for tax purposes she wanted to incorporate the business. The plaintiff was opposed to this idea initially, but later agreed once he was assured by the defendant-wife that she would split the ownership of the corporation's shares equally. This arrangement changed when the defendant-wife decided to give their son a few shares. According to the plaintiff, "We were talking in terms of fifty shares and—which would've been twenty-four for her, twenty-four for me, and two for her son." Yet when they actually talked to an attorney, he advised that the share division should be 48-48-4.

The defendant-wife acknowledged in her testimony that she did agree to the 48-48-4 split, but only because he was her husband, and not because he was a business partner. She explained:

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He was a cook and an employee over there.

. . . I would more or less include him in a discussion, but, you know, as far as him owning the franchise, he didn't own it. He knew he didn't own it, and it never was his. But being married to somebody, you more or less take him as a partner. I didn't take him as a partner in 1968 when he went to work over there; we were partners in marriage.

. . . .

. . . He went to work there without any discussion of what was to be done in the future. I didn't think it had to be discussed. When you are married to someone, why would you say, this is mine, this is yours, and you take this. This is not the way it works.

Although the facts of this case are relatively clear, the theory or theories upon which the plaintiff may obtain relief are not. The dispute revolves around the oral agreement reached sometime near 28 April 1977 in which the defendant-wife orally agreed that the plaintiff would get 48% of the shares of stock to be issued once the business was incorporated. The defendants' assignments of error question the denial of their motions, the admissibility of much of the evidence, and the correctness of the trial judge's charge to the jury.

Yet, the ultimate question to be determined in this case is whether or nor the oral agreement between this husband and wife is enforceable by the husband on any theory. The defendants' Assignment of Error No. 10 states that the trial court erred by failing to dismiss the plaintiff's case at the appropriate times "on the grounds that the Plaintiff's evidence and all of the evidence failed to prove and support any legal basis which would support any of the relief sought by the Plaintiff."

The pleading and the transcript reveals that many theories of relief and defenses to that relief were bantered about on the trial level and now have been tossed to this Court on appeal. The complaint originally prayed for, among other things, a "judgment declaring plaintiff to be the owner of 48 percent of the shares of stock in Hamburg Valley, Inc." At trial, the plaintiff sought relief on the basis of (1) the fiduciary relationship between directors of

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a corporation, (2) the fiduciary duty between a husband and wife, and (3) the presence of an enforceable oral agreement. Before the plaintiff rested his case, he asked that the pleadings be amended to conform to the evidence. The defendants, on the other hand, argued that the agreement was (1) an unenforceable stock subscription, (2) a revocable gift, and (3) barred by the statute of limitations.

Despite all these possible theories the parties stipulated that only one issue would be submitted to the jury. This issue asked: "Is the Plaintiff entitled to ownership of 48% of the stock of Hamburg Valley, Inc.?" The trial court instructed the jury on the law of contracts, charging that the issue would be decided according to whether they found an agreement between the parties.

Having considered the issue submitted, the legal premise of the jury instructions and the alternative theories for relief presented, it appears to this Court that no relief can be granted unless the plaintiff has proved a valid enforceable contract with either of the defendants. Because the plaintiff has failed to prove an enforceable agreement, we hold that the judgment below must be reversed.

I.

The major contentions that must be dealt with are: (1) was this agreement a shareholders' agreement or a preincorporation stock subscription which must be in writing to be enforceable; (2) was this oral contract based on valid consideration; (3) was a declaratory judgment an appropriate method to resolve the present dispute; and (4) was the plaintiff's claim barred by the three-year contract statute of limitations?

[1] As the facts have already indicated, the defendant-wife orally agreed prior to the filing of the Articles of Incorporation that the plaintiff would be entitled to 48% of the corporation's stock once the corporation was formed. This oral express contract was a type of preincorporation agreement and was between the plaintiff and the defendant-wife alone since the corporation had not yet come into existence.

The plaintiff vigorously contends that this agreement is not a stock subscription. According to G.S. 55-43(a), "[a] preincorporation subscription is a promise or contract to take shares in a cor-

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poration to be organized and to pay the agreed price thereof to the corporation or to others for its benefit." The plaintiff's claim to any rights in this business rests on his years of service prior to incorporation and subsequent service after the incorporation of the business. G.S. 55-46(a)(2), entitled "Consideration for Shares," allows shares to be issued for "[l]abor or services actually rendered to the corporation." The word "rendered" indicates that the services must be performed prior to the issuance of the shares, so the requirement that the shares be taken for an "agreed price" has been satisfied by his previous years of work in the business.

The plaintiff contends that this agreement is not for the purchase of shares, but merely an agreement entitling him to a percentage of the business. On direct examination the plaintiff reveals otherwise:

We talked about it before we went to the attorney's office, and she wanted to give her son a few *shares*, and I told her it didn't make any difference to me.

. . . .

She wanted it—we were talking in terms of *fifty shares* and—*which would've been twenty-four for her, twenty-four for me, and two for her son.*

. . . .

When we got to the attorney's office, I don't remember, but evidently he changed it to 48-48-4.

. . . .

[W]hen we were talking about *shares*, we didn't know whether it would come in ten *shares*, twenty-five, fifty or a hundred, so we was talking about fifty, which would have been a hundred percent. [B]ut when we got to the attorney's office . . . he advised us that it would be 48-48-4. (Emphasis added.)

By his own testimony the plaintiff explains what their agreement entailed. Their discussion and later agreement was that he was to receive 48 of 100 shares once the corporation was formed. Their agreement by definition was a preincorporation subscription. G.S.

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55-43(b) states that "[n]o preincorporation . . . subscription is valid unless in writing, signed and delivered by the subscriber." Therefore, this agreement is not enforceable because it runs amiss of G.S. 55-43(b), one of Chapter 55's Statute of Frauds provisions. The plaintiff claimed in oral argument that this section requiring a writing is for the benefit of the corporation to prevent potential stock purchasers from failing to follow through with their agreements to purchase shares and not as an excuse by the corporation to refuse to issue the shares. Although this rationale may be correct, G.S. 55-43(h) gives either party to the subscription the right to enforce "payment of the subscription price or delivery of the share certificate, as the case may be." Nevertheless, the purpose of any statute of frauds type of provision is to prevent fraud by requiring certain important transactions to be evidenced by a writing. 37 C.J.S. *Frauds, Statute of* § 1 (1943). Further evidence is found in the Articles of Incorporation that the oral agreement concerned actual shares to be issued immediately rather than a percentage of the entire business. The Articles of Incorporation for Hamburg Valley, Inc., give the corporation the authority to issue 1000 shares and specifically deny the shareholders' preemptive rights to acquire additional or treasury shares of the corporation. G.S. 55-56 gives shareholders a preemptive right to purchase in proportion to their percentage of ownership additional shares which the corporation wishes to offer for cash. The statute also allows for this right to be limited or denied in the corporation's charter. G.S. 55-56(a). Basically, a shareholder can use his preemptive right to maintain the same percentage of control over the corporation even though the corporation issues more shares. Since their oral agreement discussed only the issuance of 100 shares, 900 shares remain which when issued may effectively undermine the plaintiff's alleged 48% of the corporation. Therefore, the Articles of Incorporation do not reflect his interpretation of their oral agreement, but indicate more strongly that their agreement was a stock subscription. We hold that because this subscription agreement with the defendant-wife was not in writing, signed by the party to be charged, and delivered by the subscriber as required by G.S. 55-43(b), it is unenforceable and the judgment below is reversed.

[2] A preincorporation agreement may also be used in a closely-held corporation simply as an agreement to incorporate, but

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which also serves as a shareholders' agreement once the corporation's organization has been completed. In a closely-held corporation often the promoters will be the sole shareholders of the corporation. In *Wilson v. McClenny*, 262 N.C. 121, 136 S.E. 2d 569 (1964), the promoters of the corporation entered into a preincorporation agreement intending that the contract would be a shareholders' agreement after incorporation. This agreement insured that each of the shareholder-promoters would vote their stock to elect each a director to the corporation and to elect the promoters as president and vice-president.

In the present case, the plaintiff contends that by the 1977 agreement he had already acquired a partnership interest in the business. He argues that he had attained the status of potential shareholder and promoter of the corporation similar to his wife. Therefore, according to the plaintiff, their agreement prior to incorporation was an attempt only to settle each party's percentage in the corporation so as to insure his receipt of at least 48% of the corporation's stock. In essence, their agreement was a shareholders' agreement which established the control of the corporation, similar to the agreement in *Wilson v. McClenny, supra*. Because the present corporation is so closely held and the Articles of Incorporation named each party as well as their son as a director, a more detailed agreement indicating how a shareholder was to vote his stock as found in *Wilson v. McClenny* was unnecessary.

G.S. 55-73(b) enables the shareholders in a closely-held corporation through such an agreement to operate the corporation like a partnership. Basically, this statute allows the formation of an incorporated partnership. *Blount v. Taft*, 29 N.C. App. 626, 225 S.E. 2d 583 (1976), *aff'd*, 295 N.C. 472, 246 S.E. 2d 763 (1978). Yet, G.S. 55-73(b) requires that there must be an agreement in writing of all the shareholders. Although this "writing may consist of a written provision in the charter or by-laws," *id.* at 631, 225 S.E. 2d at 586, a review of the present charter reveals no embodiment of such an agreement establishing each party's percentage share of the corporation. Thus, because their agreement was oral, it is an unenforceable shareholders' agreement. Therefore, the plaintiff would have to prove the percentage of the business he claims he had previously acquired and would not be able to rely on the 48% agreed upon in the unenforceable shareholders' agreement. As

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the record clearly shows, the plaintiff has offered no evidence as to what percentage of the business he allegedly acquired between 1967 and 1977.

II.

[3] The above discussion attacks the oral nature of the agreement through the statutes of the Business Corporation Act. The following treatment looks to whether the agreement is enforceable on the basis of regular contract law. The plaintiff stated openly to the trial court that "Your Honor, our entire theory is that there was an agreement which this court can enforce." To be enforceable, this agreement, like other contracts, must be based on valuable consideration.

The plaintiff contends that in 1967 he received a part of her business in consideration of his leaving his tire business to come and work for her. The plaintiff's testimony at trial does not support that contention. He stated that from the first day that the Kentucky Fried Chicken business opened he had helped his wife by working there. When the defendant-wife became ill, he began working more hours but initially he was only going to work for awhile. Later, only after the defendant-wife had begged and cried at great lengths did he agree to work there longer. When asked what the defendant-wife thought or what he told her would happen to his business once he came to work for her, he replied that even he did not know what would happen to his business, implying that there was no bargained-for exchange that he would receive an interest in her business in consideration of his leaving his own business.

The plaintiff also stated that they never discussed the ownership of the Kentucky Fried Chicken business. He indicated that the only promise she made with respect to his change in jobs was that "we'd save all that we could if I went." The fact that she stated that they would share everything is not tantamount to saying that she was giving him a legal interest in the business.

Finally, the plaintiff related that "[w]hen we separated she wanted me out of the business, and I tried three or four reasonable ways to get out of the business and to get into something else that I could do." This testimony and the circumstances of his wife's cancer under which he entered the business full time

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demonstrated that his interest in the business evolved from his status as a husband, and not as a business partner.

In *Leatherman v. Leatherman*, 297 N.C. 618, 256 S.E. 2d 793 (1979), the plaintiff-wife had worked in the family business, up to forty hours a week for twenty-three years. The business was later incorporated and all 930 shares of stock were issued to her husband. He explained that this arrangement was necessary for tax purposes and that she would get the business eventually anyway. On the basis of resulting trust and constructive trust, the Supreme Court denied that the wife was entitled to any of the shares in the corporation.

The first premise of the Supreme Court's analysis in *Leatherman* stated that the plaintiff-wife had not overcome "the presumption that services rendered by a wife in her husband's business are gratuitously performed absent a special agreement to the contrary." *Id.* at 622, 256 S.E. 2d at 796. This presumption utilized in *Leatherman* refers only to a wife and her services in the husband's business. This presumption should equally apply to a husband's services in the wife's business. In *Guano Co. v. Colwell*, 177 N.C. 218, 98 S.E. 535 (1919), the Court stated that absent a contract between the husband and wife the husband was entitled to no share in the crops or profits from his wife's farm, the presumption being that he was working gratuitously to contribute to the support of the family. In the present case, the plaintiff offered no evidence that the defendant-wife agreed to give him a specific interest in her business when he began work for her in 1967. The only agreement established was reached in 1977 after his services had been rendered. Therefore, he has shown no special agreement that his services were not originally and continually gratuitously performed, even though, like the wife in *Leatherman* he was paid a salary. Also, in light of the fact that his wife was in very poor health, that she was suffering from cancer, and that he only came to her rescue after much emotional pleading from her, indicates that he entered the business because he was her husband, and not because of any special contractual agreement between them.

The plaintiff does not attempt to establish that at any other time did he and the defendant-wife enter into an agreement about his interest in the business. The filing of partnership tax returns

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is significant evidence of the existence of a partnership. *Davis v. Davis*, 58 N.C. App. 25, 31, 293 S.E. 2d 268, 272, *disc. rev. denied*, 307 N.C. 127, 297 S.E. 2d 399 (1982). No such returns were filed, and in 1976 the tax return for which the plaintiff supplied the information designated the plaintiff as an employee, indicating that no agreement making him a partner was reached prior to this time. The importance of the fact that no express agreement between 1967 and 1979 was pled or proved establishes that the oral agreement in 1977 concerning his percentage in the corporation was not supported by valid consideration. A reading of the record as a whole reveals that the oral agreement of 1977 was simply a statement by the wife of her intention to formally share through a gift a part of her business with her husband and her son who had also worked for her. Since the stock has never been issued, this gift by the defendant-wife has never been delivered, delivery being a necessary element before a gift can be validated. See *Fesmire v. Bank*, 267 N.C. 589, 148 S.E. 2d 589 (1966). Also, since his labor and services in the corporation had already been performed, they cannot serve as the consideration in exchange for his wife's future performance of relinquishing to him part of her business so as to render this contract enforceable. 17 C.J.S. *Contracts* § 116 (1963). Although the plaintiff worked after the 1977 agreement, he offered no evidence and did not attempt to prove that his 48% was in consideration for those future services. We hold that the preincorporation agreement is not binding or enforceable because it was not based on valuable consideration necessary for a valid contract.

III.

[4] In the alternative, we have elected to discuss the claim for declaratory relief expressed in paragraph twenty-eight of the complaint. The parties stipulated that only the following issue would be submitted to the jury: "Is the Plaintiff entitled to ownership of 48% of the stock of Hamburg Valley, Inc.?" The jury answered, "Yes." The judgment as signed by the trial judge based on the jury's response to this issue does declare that the plaintiff is entitled to ownership of 48% of the corporation's stock [which would mean 480 shares]. We hold that on the record before us that a declaratory judgment is inapplicable for two reasons.

In the first place, "[t]he Declaratory Judgment Act, G.S. 1-253, *et seq.*, affords an appropriate procedure for alleviating

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uncertainty in the interpretation of *written* instruments and for clarifying litigation." (Emphasis added.) *Bellefonte Underwriters Insur. Co. v. Alfa Aviation*, 61 N.C. App. 544, 547, 300 S.E. 2d 877, 879 (1983). Therefore, a declaratory judgment action is designed to provide an expeditious method of procuring a judicial interpretation of *written* instruments, such as wills, contracts, statutes, and insurance policies. See *Bennett v. Attorney General*, 245 N.C. 312, 96 S.E. 2d 46 (1957). In the present case, there is no written instrument for the trial judge to interpret or from which he can declare rights. The plaintiff in order to obtain a declaratory judgment must have offered an enforceable written agreement so the trial judge as a matter of law could resolve the issue of whether the plaintiff was entitled to 48% of the corporation's stock. The existence of some agreement is not in dispute, but because it is an oral agreement and its enforceability has not been proved, relief under the Declaratory Judgment Act is improper.

Secondly, the remedy of a declaratory judgment is not available for the determination of issues of fact alone. Although it may be necessary in order to resolve the legal questions that certain questions of fact be decided, the primary purpose of the Declaratory Judgment Act is for the determination of questions of law. *Insurance Co. v. Unemployment Compensation Com.*, 217 N.C. 495, 8 S.E. 2d 619 (1940). The parties by their stipulation as to the issue allowed the case to be determined on the basis of a question of fact before the jury. Once the jury had decided this fact, the trial judge had no questions of law to resolve. The final judgment merely orders and declares the jury's answer to the issue submitted, demonstrating that a declaratory judgment was unnecessary and inappropriate in this case.

IV.

[5] Again, in the alternative and aside from the above reasons, the judgment must be reversed outright, and not merely remanded for a new trial, because the action was barred by the statute of limitations. The defendants effectively raised this defense on 9 November 1981 in their answer to the complaint. Although in form the complaint asked for relief through a declaratory judgment, in substance, as represented by the evidence produced and the issue submitted to the jury, the action is based on contract.

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Therefore, G.S. 1-52(1), the three-year contract statute of limitations, is the appropriate statute to apply.

Although the complaint was filed 11 August 1981 and ordinarily would be the date to which to look for the running of a statute of limitations, the parties have by stipulation established 27 March 1981 as the cutoff date. This date of 27 March 1981, according to the stipulation, is bottomed upon prior dealings in certain specific domestic relations cases between the parties. We adopt their stipulation.

The cause of action to enforce the oral agreement entitling plaintiff to 48% of the stock accrued as soon as the corporation was formed. The formation of the corporation occurred through the filing of the Articles of Incorporation on 28 December 1977. See G.S. 55-8. The Articles list the plaintiff as one of the three-member board of directors and as vice president, a corporate officer. Machinery exists for an organizational meeting of the board of directors named in the Articles of Incorporation upon giving three days' notice as provided by G.S. 55-11. Anytime after such three days' notice and meeting the stock could have been issued. New Year's Day in 1978 fell on a Sunday. The following day was a legal holiday. If for instance the three days' notice of organizational meeting had been given on 30 December 1977, the earliest official day for the meeting would have been 5 January 1978. As a matter of arithmetic more than three years elapsed between 5 January 1978 and 27 March 1981. We hold the statute of limitations had run and this present action is barred.

We recognize that the plaintiff, through paragraphs 19 and 22 of the complaint, seeks to assert the date of 31 December 1979 as the date the individual defendant denied him his property rights. The complaint alleges that 31 December 1979 is when the defendant-wife abandoned the plaintiff and left the marital home. While this date may be important for domestic relation litigation, it is irrelevant to the enforcement of an oral contract made in 1977 for corporate stock. As was said in *Lewis v. Shaver*, 236 N.C. 510, 513, 73 S.E. 2d 320, 322 (1952), "the mere lack of knowledge of the facts constituting a cause of action does not postpone the running of the statute." See also *Gordon v. Fredle*, 206 N.C. 734, 175 S.E. 126 (1934).

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V.

The remaining assignments of error from the defendants' list of twenty-six deal almost exclusively with the admission of evidence and jury instructions. Since the plaintiff is not entitled to any judgment in his favor and since no new trial has been ordered, we decline to discuss them.

We reverse the judgment of the trial court entered in favor of the plaintiff.

Reversed.

Judge JOHNSON concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

The provisions of the Business Corporation Act, codified at N.C. Gen. Stat. §§ 55-1 *et seq.* (1982), do not, in my view, defeat Mr. Penley's claim. Mrs. Penley's agreement with Mr. Penley that he was to receive stock when the Kentucky Fried Chicken business was incorporated was neither a pre-incorporation agreement nor a shareholders' agreement. Further, I am not convinced that the statute of limitations is a bar to Mr. Penley's claim. No stock in the corporation has ever been issued. I believe the statute of limitations runs from the time Mr. Penley made a demand for the stock promised—the breach of the contract. Mr. Penley filed his action within three years of his demand.

In my view, this case turns on an analysis of simple contract law. The majority has decided that the agreement to split the stock lacks valuable consideration. I disagree. From the outset, Mr. Penley has proceeded on the theory, as revealed by his complaint and his evidence at trial, that the parties entered into a partnership agreement prior to the proposed incorporation. The partnership agreement constitutes the "special agreement" absent in *Leatherman*. Consequently, Mr. Penley's surrender of his partnership interest was the valuable consideration for the agreement to split the stock.

Mrs. Penley's attorney stipulated that the following issue would be submitted to the jury: "Is the Plaintiff entitled to

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ownership of 48% of the stock in Hamburg Valley, Inc.?" Subsumed within the jury's finding that Mr. Penley was entitled to 48% of the stock is the jury's determination that there was "valuable consideration." Although Mrs. Penley's attorney objected to the court's instruction on consideration, he based his objection on narrow grounds. His assignment of error deals only with the court's failure to limit its instruction on consideration to an oral trust theory. Since Mrs. Penley failed to assign error to the sufficiency of the instruction on consideration on a partnership theory, and since she stipulated to the issue submitted to the jury, I believe the jury's verdict should stand. In my view, the trial court's judgment should be affirmed.

ALLEN L. MIMS, JR. v. MARSHA P. MIMS

No. 8210SC1126

(Filed 3 January 1984)

Husband and Wife § 14; Trusts § 13.4— conveyance to husband and wife— payment by husband—rebutting presumption of gift to wife

Plaintiff husband presented sufficient evidence to rebut the presumption of a gift to defendant wife of an entirety interest in property to which title was taken in the names of both spouses so as to entitle plaintiff to a resulting trust in the property where plaintiff presented evidence that he paid the entire consideration for the property, a house and lot, with his separate funds received from a family inheritance; the names of both spouses appeared on the deed only because plaintiff's real estate agent advised plaintiff at the closing that North Carolina law so required; between the time of the offer to purchase and the closing, plaintiff told various persons that he was paying for the house with his own funds and that it was to be his house; it was plaintiff's intention at all times to own the property individually; and plaintiff did not intend to make a gift to defendant. The fact that plaintiff proceeded with the closing and accepted a deed in the names of both parties did not show that plaintiff abandoned his original intention to own the property individually.

APPEAL by plaintiff from *Brewer, Judge*. Judgment entered 28 September 1982. Heard in the Court of Appeals 21 September 1983.

Upon remand from the North Carolina Supreme Court decision in *Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982), the trial court, sitting without a jury, made findings of fact and conclusions

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of law and entered judgment in favor of the defendant, Marsha P. Mims and against the plaintiff, Allen J. Mims, Jr. on his claim for sole beneficial ownership of the parties' marital home, the payment for which was furnished entirely by the plaintiff husband, with title taken in the names of both parties as husband and wife. The trial court declared that the parties, now divorced, hold the property as tenants in common. Plaintiff appeals from the denials of his motions for judgment notwithstanding the verdict and for a new trial on the grounds that the verdict of gift is not supported by the weight of the evidence.

McDaniel, Heidgerd & Schiller, by L. Bruce McDaniel, for plaintiff appellant.

Sullivan & Pearson, P.A., by Mark E. Sullivan, for defendant appellee.

JOHNSON, Judge.

This appeal involves the attempt of plaintiff Allen Mims to establish sole ownership of certain real property by means of a resulting trust in his favor. Plaintiff presents three questions for review, all raising the common issue of whether the facts of record support the judgment entered. Specifically, whether plaintiff produced sufficient evidence of his intention to retain sole ownership of the property to rebut the presumption that he intended to make a gift of an entirety interest to his former wife, Marsha Mims, to mandate the declaration of a resulting trust in his favor. Plaintiff argues that he presented "overwhelming relevant, material and unrefuted evidence" to prove that he took no actions supporting a finding of gift, that he did not intend to make such a gift, and did not, in fact, make a gift of the property to the defendant. Consequently, plaintiff argues that the trial court erred in making certain findings of fact, in failing to make certain other findings, and abused its discretion by denying plaintiff's motions to set aside the verdict. For the reasons set forth below, we hold that the relevant and material facts of record do not support the trial court's conclusion of law that the presumption of gift was not rebutted, and therefore, the judgment awarding defendant a one-half interest in the subject property must be reversed. We will first give a brief review of the history of this case, as it has some bearing on the resolution of the issues presented by this appeal.

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I

Plaintiff and defendant were married in 1973, separated in 1977, and divorced in 1978. In 1974, the plaintiff purchased a residential house and lot, title being taken in both names. It was undisputed that he paid the entire consideration from his separate funds. Plaintiff originally filed this action seeking reformation of the deed based on a mutual mistake and a judgment declaring him the sole owner of the property. He alleged, *inter alia*, that it had always been the intention and the understanding of the parties that the property was to be his alone and that both names appeared on the deed only because their real estate agent had erroneously advised them that North Carolina law so required. Defendant opposed reformation of the deed conveying the property to both parties as tenants by the entirety, and her motion for summary judgment was granted. On appeal plaintiff argued, *inter alia*, that although it was not mentioned specifically in the pleadings, the evidentiary showing on the summary judgment motion was sufficient to vest beneficial title in him alone on a theory of resulting trust.

Ultimately, the case reached the Supreme Court. The court upheld summary judgment for the defendant wife on the grounds that the mistake was one of law, not fact, and therefore reformation of the deed on the basis of mutual mistake was not supported by the evidentiary showing as a matter of law. *Mims v. Mims*, *supra*, 305 N.C. at 45, 286 S.E. 2d at 783 (hereafter "*Mims*"). However, the court also held that the evidentiary forecast on summary judgment indicated that the plaintiff would be able to rebut the presumption of gift arising when a husband purchases real property and title is taken in the names of both spouses jointly, and make out a *prima facie* case for a resulting trust in his favor at trial. 305 N.C. 59, 286 S.E. 2d at 791.

In the course of its opinion on the issue of resulting trust, the court examined prior North Carolina law controlling the presumption of resulting trust in interspousal conveyances when the wife provided the consideration and the contrary presumption of gift when it was the husband who furnished the consideration. In what is now considered a landmark decision, the Court in *Mims* concluded that the original rationale for employing different presumptions for husbands and wives is no longer viable, and

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held that the presumptions should be equalized and a gift implied whether the husband or the wife provided the consideration. 305 N.C. at 48, 286 S.E. 2d at 788. The presumptive gift rule was made applicable to all cases not governed by the Equitable Distribution Act. However, that aspect of *Mims* is not involved in this appeal because it was the plaintiff husband who furnished the consideration in this case.

In the course of reviewing the sufficiency of plaintiff's evidentiary forecast, the court outlined the general rules governing his claim for a resulting trust. These general rules are also determinative of the case *sub judice* and may be summarized as follows:¹

1. A resulting trust arises when a person becomes invested with title to real property under circumstances which in equity obligate that person to hold the title and to exercise ownership for the benefit of another. A trust of this sort does not arise from or depend upon any agreement between the parties; it results from the fact that one person's money has been invested in land and the conveyance taken in the name of another. The trust is created in order to effectuate what the law presumes to have been the intention of the parties in these circumstances—that the person in whom the land was conveyed holds it as trustee for the person who supplied the purchase money.
2. At common law the rule is subject to the qualification that where the person who pays the price is under a legal, or even, a moral obligation to maintain the person in whose name the purchase is made, there is a presumption in equity that the purchase is intended as an advance or gift to the recipient.
3. To make out a *prima facie* case for a resulting trust plaintiff must rebut the presumption of gift by evidence that he intended no gift.
4. The presumption is one of fact and not of law, and may be rebutted by evidence of circumstances tending to show a con-

1. Citations to the relevant authorities relied upon by the Supreme Court in *Mims* may be found at 305 N.C. 46-47, 56-58, 286 S.E. 2d at 783-784, 789-790.

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trary intent or that the purchaser did not intend the ostensible grantee to take beneficially.

5. A resulting trust arises, if at all, in the same transaction in which legal title passes, and by virtue of consideration advanced before or at the time legal title passes.

6. In the final analysis, whether or not a resulting trust arises in favor of the person paying the consideration for a transfer of property to another depends on the intention, at the time of transfer, of the person furnishing the consideration, and such intention is to be determined from all the attendant facts and circumstances.

7. When a party proves by clear, cogent, and convincing evidence that he or she did not intend to make a gift of an entirety interest in the property to his or her spouse, the presumption of gift will have been rebutted. The parties will then stand as if they were not man and wife, that is, they stand as other parties and the general rule prevails.

8. When the presumption of gift is rebutted the effect is automatically to create a resulting trust in favor of the party furnishing the purchase price.

The court stated that it was undisputed that plaintiff furnished from his separate funds the entire consideration for the real property before or at the time title passed, and concluded that "[t]he only factual issue, therefore, is plaintiff's intent at the time he furnished the consideration." 305 N.C. at 57, 286 S.E. 2d at 790. The court continued, "[i]f, therefore, plaintiff can prove at trial by clear, cogent, and convincing evidence that he did not intend to make a gift of an entirety interest in the property to defendant, then he will have rebutted the presumption of gift." *Id.* at 57-58, 286 S.E. 2d at 790.

The court also summarized the evidentiary forecast established by the parties' pleadings, affidavits and documentary evidence as follows:

It shows that plaintiff supplied the entire purchase price for the property from money he received from his father and grandfather. He at all times intended for the property to be his alone and so advised the defendant at and before the clos-

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ing. Defendant "agreed with me that this real estate was mine and mine alone." Plaintiff acquiesced in placing title in both his and defendant's names only because he was advised by his real estate agent that North Carolina law so required.

305 N.C. at 59, 286 S.E. 2d at 791. On the basis of this forecast,² the case was remanded to the Superior Court.

II

Upon remand to the trial court, the parties waived a jury trial. The only factual issue to be determined was the plaintiff's intent at the time he furnished the consideration for the property, that is, at the time of the closing on 12 December 1974. Plaintiff presented the testimony of several witnesses, including himself, his father and several friends of his and his wife. The only witness testifying for the defense was defendant Marsha Mims.

On the whole, the evidence presented by plaintiff was consistent with the evidentiary forecast he presented in opposition to defendant's summary judgment motion. Defendant's own testimony conflicted with plaintiff's account of conversations between the parties prior to the closing with regard to plaintiff having discussed with defendant the realtor Richard Smith's statement regarding the necessity for title being taken in both names, with regard to plaintiff's having advised defendant that he intended the property to be his alone, and with regard to defendant's having agreed with plaintiff that the real estate was to be his alone. However, plaintiff's father and friends, Paul Simpson and Danford Josey, all testified that at the relevant times, plaintiff had stated in their presence that the house was to be his alone and further, that they had never heard plaintiff state that he was making a gift of the property to Mrs. Mims or Mrs. Mims claim that such a gift was being made to her.

Both realtors involved with the transaction testified. Richard Smith was then employed as an agent with the real estate company of James Stephenson. Smith was the realtor who showed the subject property to plaintiff and who was present when the parties signed the offer to purchase on 16 November 1974.

2. A more complete synopsis of the contents of the plaintiff's and defendant's deposition testimony is contained in *Mims*, 305 N.C. at 43-45, 286 S.E. 2d at 782-783.

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Stephenson was the realtor who was present at the closing on 12 December 1974. Smith testified that, "Allen asked me sometime before title was made, can I put this in my name, the house in my name; and my answer was no." He would not recall any further conversations on that issue with the plaintiff. However, he never heard the plaintiff state that he was making a gift of the property to his wife. Stephenson testified that although he was present at the closing, he could not recall having heard plaintiff raise the question about how the property was to be titled.

Plaintiff, in both his deposition and testimony at trial, had testified that he raised the question of title with the realtors twice, first at the time the offer was signed and again at the closing when he gave his personal check for \$69,000 to pay for the house. On direct examination, plaintiff testified that Smith presented the written offer to purchase to plaintiff for his signature. The writing recited that the deed was to be made to Mr. and Mrs. Mims. Plaintiff asked Smith why it had to be in both people's names. The following exchange occurred:

Q. What did he say?

A. He said that's the way it was in North Carolina.

Q. And as a result of that, what did you do about that particular inclusion at that time?

A. Well, I figured he knew what he was talking about. He was a realtor and sold a lot of houses. I took it as his word that that is the way it had to be.

As to the closing, plaintiff testified that he said to the realtor, "are you sure*this has to be titled in both people's names and he said yes in North Carolina you have to do it like that . . . I took it that he knew what he was talking about and I told him, I said, well its my personal check. It's a lot of money and he said well come on let's sit down . . . and we went on and closed the house."

The only aspect in which plaintiff's evidence substantially differed from his evidentiary forecast concerned whether plaintiff inquired as to the form of the title once or twice. The only substantial conflict in the parties' evidence went to the issue of whether defendant agreed with plaintiff that the house was to be solely owned by him. At the close of all the evidence, plaintiff

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moved for a directed verdict pursuant to G.S. 1A-1, Rule 50, and the motion was denied.

On 28 September 1982, the trial court entered a judgment in favor of defendant, concluding that plaintiff had failed to present clear, cogent and convincing evidence sufficient to rebut the presumption that he did not intend to make a gift of an entirety interest to defendant, and declaring the parties to hold the subject property by tenancy in common. The trial court's relevant findings of fact may be summarized as follows:

1. Prior to 16 November 1974, the parties lived in an apartment and were investigating several parcels of real estate for a home.
2. Both parties signed the offer to purchase on the subject property. The offer recited that the deed was to be made in the names of Allen J. Mims, Jr. and wife, Marsha P. Mims. At the time of the closing, plaintiff accepted the deed in the name of the parties as husband and wife.
3. The source for the lump sum cash payment for the purchase was a separate family inheritance of plaintiffs and plaintiff paid all of the purchase price and closing costs of the subject property.
4. Plaintiff asked the realtor, Richard Smith, prior to signing the offer to purchase, why the offer recited that the deed was to be made to both parties as husband and wife and was told by Smith that a deed in that form was required in North Carolina.
5. Defendant was unaware of plaintiff's conversation with the realtor and did not know of the desires he expressed or agree to them.

The trial court also made the following pertinent findings of fact as to plaintiff's intention regarding ownership:

11. At the time of the offer to purchase and at all times thereafter until the closing, plaintiff expressed a desire to own the subject property individually to several persons. These included his father, a lifelong friend, and a fraternity brother. These statements were outside the presence of plaintiff.

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17. Prior to the closing plaintiff wished to own the property individually. However, believing that such individual ownership was not possible in North Carolina, plaintiff consciously and intentionally chose to proceed with the completion of the purchase.

Based upon its findings of fact, the trial court made the following conclusion of law:

2. Plaintiff's actions in proceeding with the closing, when he realized that such action would have the legal effect of creating an equal joint ownership with the defendant, notwithstanding his desire to own the property separately and individually, does not rebut by clear, cogent and convincing evidence the presumption of an intent on the part of plaintiff to make a gift of one-half joint ownership of the subject property to defendant.

III

Plaintiff has assigned error to certain inclusions and exclusions from the trial court's findings of fact, to the conclusions of law drawn therefrom, and to the denial of his motions to set aside the verdict as contrary to the weight of the evidence, and for a new trial. The question of the sufficiency of the evidence to support findings of fact made by the trial court is a proper subject for appellate review. *Distributing Corp. v. Schofield*, 44 N.C. App. 520, 261 S.E. 2d 688 (1980). When, as in the present case, the parties waive a jury trial, findings of fact made by the court and supported by competent evidence are conclusive, even though there is evidence in the record which would have supported contrary findings. *Rock v. Ballou*, 286 N.C. 99, 209 S.E. 2d 476 (1974). A judgment based upon such findings will not be disturbed on appeal, absent error of law appearing on the face of the record. *Wall v. Timberlake*, 272 N.C. 731, 158 S.E. 2d 780 (1968); *Distributing Corp. v. Schofield*, *supra*. Notwithstanding the rule that an appellate court is bound by findings of fact which are supported by competent evidence of record, it is not bound by the conclusions or inferences the trial court draws from them. *Heath v. Manufacturing Co.*, 242 N.C. 215, 87 S.E. 2d 300 (1955). Upon appeal an appellate court may look to the evidence in the record to interpret the findings of fact made by the trial judge. *Harrelson v. Insurance Co.*, 272 N.C. 603, 158 S.E. 2d 812 (1968). Where crucial

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factual findings fail to support the trial court's conclusion of law, the judgment entered thereon is properly reversed. *Heath v. Manufacturing Co.*, *supra*. In the case under discussion, the trial court correctly found that it had been plaintiff's intention at the time of the offer and at all times prior to the closing to own the property individually. However, from the judgment entered, it is evident that the trial court based its conclusions of law entirely on inferences drawn from the fact that plaintiff chose to proceed with the closing, knowing that both his name and the name of his wife appeared on the deed. We note here that were this always the dispositive fact in cases such as this, the doctrine of "resulting trust," which is premised on the theory that the state of title created by the deed itself is not reflective of the intention of the payor at the time of the purchase, would have no place in our legal system. The record discloses that upon the facts of this case, the trial court erred in inferring, as it evidently did, that plaintiff ever abandoned his "desire" or "wish" to own the property individually, and therefore erred in concluding that plaintiff failed to rebut the presumption that he made a gift of the property interest to defendant.

To begin with, the only substantial conflict in the parties' evidence went to the issue of whether defendant *agreed* with plaintiff that the house was to be owned by him individually. In *Mims*, the Supreme Court reiterated the long standing rule that a resulting trust does not arise from or depend upon any agreement between the parties, but rather, arises from the fact that one person's money has been invested in land and the conveyance taken in the name of another. 305 N.C. at 46, 286 S.E. 2d at 783. *See also Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938). It must be remembered that, "[a] resulting trust is a creature of equity, and arises by implication or operation of law to carry out the presumed intention of the parties, that he who furnishes the consideration for the purchase of land, intends the purchase for his own benefit . . ." *Waddell v. Carson*, 245 N.C. 669, 674, 97 S.E. 2d 222, 226 (1957). Although it is evident that the Supreme Court found plaintiff's allegations regarding defendant's acquiescence in his sole ownership significant for the purpose of overcoming defendant's motion for summary judgment, plaintiff's failure to carry his burden of proof to establish that subsidiary fact is not dispositive on the issue of his intent at the time of the purchase.

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On that issue, plaintiff's evidence was sufficient to rebut the gift presumption.

Plaintiff testified that he wanted to move from the apartment the parties lived in because of noisy neighbors and the desire to be closer to his work; that he like the realty in question, showed it to defendant, his friends and his father, and that consequently, "I made an offer on it, November 16, 1974"; that when he saw that both names were to be on the deed, he asked why it had to be in both names, was told that North Carolina law so required and just accepted that as a fact; that his intention at the time the offer was signed was that this was to be his house and he did not intend to make a gift to defendant.

Further, that between the time of the offer and the closing, he told various persons that he was paying for the house by cash, out of his own funds, and as far as he was concerned, it was his house. Specifically that, "it was mine," and that no gift to defendant was intended. Rather he stated that:

I tried to make it plain to her then that it was my money that my grandfather left me and it was mine. It was just like when I gave her my mother's diamond ring as an engagement ring to wear. I made the same agreement with her then that it was hers to wear but if anything ever happened it was the only thing I had left of my mother's and I wanted to keep it and she agreed.

Plaintiff testified that the lump sum cash payment came from money that he had inherited from his grandfather and father and that he chose that form of payment for the house as a good investment for his inheritance.

Plaintiff's testimony regarding the facts and circumstances of the closing on 12 December 1974 was consistent with his testimony concerning the preceding time period; that he was still concerned about both names appearing on the deed; that it remained his intention that he was buying the house and it was to be his; and that he never expressed a contrary intention to defendant or anyone else.

As to events after the purchase of the property, plaintiff testified that defendant voluntarily left the marital home in June, 1977. He and defendant subsequently discussed splitting up their

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personal property but he never heard defendant claim an interest in the house prior to December, 1977. On cross-examination, plaintiff testified that he had never instituted suit to determine title to the property prior to this action in 1977 because, "As far as I was concerned Marsha and I had an understanding. There was no need to. I didn't know that it didn't have to be in both people's names until this lawsuit."

Most of plaintiff's evidence, his own testimony as well as that of his witnesses, consists of his statements to the effect that he was buying the house for his own benefit. Declarations to this effect, made before or at the time of the delivery of the deed, are considered "excellent evidence to rebut a presumption of a gift to the wife." Bogert, *The Law of Trusts and Trustees*, § 459, p. 718 (2d ed. rev. 1977).

The trial court made two findings of fact reflective of the foregoing evidence, that at all times prior to the closing plaintiff "wished" to own the property individually and "expressed a desire" to own the property individually to several persons, but failed to draw the proper inferences from these findings. The unmistakable thrust of these findings is that plaintiff intended to own the property individually. As the court in *Mims* observed, the presumption of gift is one of fact and not of law, and may be rebutted by evidence tending to show a contrary intent or that the purchaser did not intend the ostensible grantee to take beneficially. *See also Creech v. Creech*, 222 N.C. 656, 24 S.E. 2d 642 (1943). The plaintiff's testimony regarding his attitude toward property that he inherited, and toward ownership of property purchased with his separate funds, together with the trial court's findings of a contrary intent on the part of plaintiff to own the property individually, are inconsistent with the conclusion of law that plaintiff failed to rebut the presumption of gift. Too much weight was given to the bare presumption itself. Professor Scott, in his treatise on trusts, has discussed the dangers of undue reliance upon the presumption alone.

The question of gift of trust is one of intention, and human nature is such that it is difficult to ascertain intention by applying definite rules. So much depends not upon the formal relationship between the parties but upon their attitudes to each other. It is true that the rules adopted by the courts

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with respect to the various relationships do not necessarily determine the final result, since they lay down presumptions which may be rebutted by further evidence. The presumptions, however, are given undue weight. Indeed, in some decisions it has been stated that they can be rebutted only by very strong, clear or even conclusive or indubitable evidence. Such a rule clearly gives too great weight to the relationship between the parties. The question is really one of intention as shown by all the circumstances. The notion that intention can be determined by the application of hard and fast rules of law is common in primitive systems of law, but it tends to disappear as courts and lawyers become more sophisticated.

5 Scott on Trusts, § 442, p. 3340 (3d ed. 1967).

Furthermore, no finding to the effect that plaintiff had *ever* abandoned his intent to own the property individually was made, nor would the evidence have supported such a finding. Evidently the trial court inferred from the fact that plaintiff proceeded with the closing and accepted the deed in both parties' names, that he had abandoned his original intention at the actual moment of the closing. Such a conclusion completely overlooks the reason why title to the property was placed in both names, and the significance of the plaintiff's mistaken belief as to the legal necessity for doing so.

On this issue, the *Mims* court cited *Shotwell v. Stickle*, 83 N.J. Eq. 188, 90 A. 246 (1914) with approval. In *Shotwell* the husband furnished the entire purchase price for an estate, but, being advised that he could not take title in his own name, had title to the property made to his wife. The court in *Shotwell* held that evidence of the *reason why* title to the property was placed in his wife's name, together with evidence tending to show the ostensible grantee's awareness that she held the property for her husband was enough to rebut the presumption of gift and create a resulting trust in the husband's favor. In *Waddell v. Carson*, *supra*, the husband's evidence that he furnished the entire consideration for the purchase of property with the real intention that title be taken in both parties names and that a mistake or inadvertence was the cause of the omission of his own name from the deed was held sufficient to rebut the presumption of gift and make a *prima facie* case for a resulting trust in his favor. *See also*

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Roberson v. Roberson, 261 Ala. 371, 74 So. 2d 445 (1954) (presumption of gift rebutted by evidence that husband alone furnished the consideration and the names of the payor husband and his wife both appeared on the deed only because the seller, believing it necessary, mistakenly instructed his lawyer to so prepare the deed).

Therefore, although plaintiff's mistake as to the legal consequences of naming them both as grantees, or as to the legal necessity for doing so, could not serve as a basis for reformation of the deed, the *Mims* court was clearly of the opinion that it could properly serve as evidence tending to *rebut* the presumption that Marsha Mims' name appeared on the deed because Allen Mims intended thereby to make a gift of an entirety interest to her. It is apparent that the trial court failed to properly assess the significance of the mistake in this case. Furthermore, there was no evidence of record to support the trial court's findings of fact that plaintiff realized that the act of having the deed made to both parties as husband and wife would create joint ownership of the property. Plaintiff was never asked, on either direct or cross-examination, to state his understanding of the legal consequences of the deed's bearing the names of both parties as grantees. Although it is impossible to determine with any certainty exactly what plaintiff realized about his action in proceeding with the closing, all of the circumstantial evidence points to the conclusion that defendant's name appeared on the deed as the result of a mistake and was there contrary to the true intention of the plaintiff.

This erroneous finding as to what plaintiff realized to be the consequences of proceeding with the closing, in part, formed the basis of the trial court's conclusion that plaintiff failed to rebut the gift presumption. This conclusion would leave plaintiff in the untenable position of, having been told that a joint deed to husband and wife was required by North Carolina law, either remaining an apartment renter or making a forced gift to his wife by virtue of having chosen home ownership, regardless of his true intention. Such a result is not mandated by the law governing interspousal conveyances. The record in this case discloses that plaintiff presented sufficiently clear, cogent and convincing evidence to rebut the presumption of a gift to defendant to war-

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rant the declaration of a resulting trust in his favor. Therefore, the judgment of the trial court must be reversed, and the matter remanded for entry of findings of fact, conclusions of law and judgment consistent with this opinion.

Reversed and remanded.

Judges BECTON and BRASWELL concur.

JAMES E. DURHAM, JR., PENELOPE K. DURHAM, AND MID-STATE HOMES, INC. v. THOMAS V. COX, INDIVIDUALLY, AND D/B/A TOM COX INSURANCE AGENCY, AND NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 823SC1048

(Filed 3 January 1984)

Insurance § 128.1— fire insurance policy—provision excluding coverage on structures used for business purposes—waiver

The "business use" provision in a fire insurance policy which stated "This coverage excludes structures used in whole or part for business purposes" was a condition working a forfeiture, which could impliedly be waived by the acts and conduct of the insurer. The doctrines of implied waiver and estoppel properly apply to such a provision since the property itself, an appurtenant structure, and the risk, loss due to fire, were already within the coverage of the policy. The "appurtenant structure" described in the policy was used by plaintiffs to do upholstery work, and all of the HO-48 endorsements issued to plaintiff described the covered appurtenant structure as a "garage building used for storage and upholstery work." At the time plaintiff applied for insurance, he listed his occupation as "upholstery" and stated that he was "self-employed." Plaintiff contended that he informed the insurance company's agent that he intended to construct a garage to be used in his business prior to the issuance of the first HO-48 endorsements covering the appurtenant structure. Once the garage was constructed and his business established therein, plaintiff again, according to his deposition, informed the agent Cox that he was using the structure in connection with his upholstery business. A third HO-48 was issued, increasing coverage to \$10,000.00 on a "garage used for storage and upholstery work." Thus, there was evidence that the insurance company, through its agent, expressly agreed to assume whatever enhanced risk was posed to the structure by plaintiffs' upholstery work.

APPEAL by plaintiffs from *Reid, Judge*. Judgment entered 15 July 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 26 August 1983.

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This is an action to recover damages incurred by plaintiff when a garage or workshop building he used to house his business, "Durham's Woodcrafts," was destroyed by fire on 3 November 1979. Plaintiffs alleged alternative claims for relief in contract and tort against defendant, Thomas V. Cox, individually and d/b/a Tom Cox Insurance Agency (Cox) and defendant, Nationwide Mutual Fire Insurance Company (Nationwide). In their first claim for relief, plaintiffs seek recovery of damages from defendants by reason of the defendants' breach of the policy insuring plaintiff's appurtenant structure against loss from fire. In their second, alternative claim for relief, plaintiffs seek recovery against Nationwide and Nationwide's agent, Thomas Cox, for negligent failure to procure coverage for the appurtenant structure. Both defendants answered, denying the material allegations of the complaint and raising, *inter alia*, the affirmative defense that language contained in the policy excludes coverage for structures used in whole or part for business purposes, and therefore acts as a bar to plaintiff's cause of action.

All parties filed motions for summary judgment. Plaintiffs, James E. Durham, Jr. and his wife, Penelope K. Durham, were deposed, and their depositions, together with the pleadings, defendants' answers to interrogatories and admissions on file were presented to the trial court. After hearing argument, the court entered an order denying plaintiffs' motion for summary judgment, granting defendant Nationwide's motion for summary judgment on both claims, granting the motion for summary judgment filed by Thomas V. Cox, individually and d/b/a Tom Cox Insurance Agency, insofar as it related to plaintiffs' contract claim and leaving plaintiffs' claim for negligent failure to procure insurance against Cox intact. From entry of this order, plaintiffs appeal.

Ward, Ward, Willey & Ward, by Joshua W. Willey, Jr., for plaintiff appellant.

Ward and Smith, P.A., by Thomas E. Harris, for defendant appellee Thomas V. Cox, individually and d/b/a Tom Cox Insurance Agency.

Sumrell, Sugg & Carmichael, by James R. Sugg and Rudolph A. Ashton, III, for defendant appellee Nationwide Mutual Fire Insurance Company.

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JOHNSON, Judge.

Plaintiffs' appeal presents two questions for review, whether the trial court erred in granting summary judgment in favor of defendants Nationwide and Cox with respect to plaintiffs' breach of contract claim and in granting summary judgment in favor of Nationwide on plaintiffs' alternative claim of negligent failure to procure insurance coverage. We find error and reverse.

The evidentiary showing on the summary judgment motion is as follows: At all times pertinent to plaintiffs' claims, the defendant Nationwide and the defendant Cox were parties to a written agreement entitled, "Agent's Agreement," which designated Thomas V. Cox as agent to represent Nationwide Mutual Fire Insurance Company in North Carolina. In this written agreement Nationwide designated Cox as its agent with authority to solicit, negotiate, and effect contracts of insurance in its behalf, and to collect premiums thereon.

Acting pursuant to the above-referenced authority in December, 1977, Cox assisted the plaintiff James Durham in the preparation of an application for homeowner's insurance. The application states that James E. Durham is self-employed and that his occupation is upholstery. According to James Durham's deposition, he told Cox at that time that he was on disability, but was working part-time doing upholstery and refinishing. The plaintiffs contend and defendants deny that during this initial conference James Durham told Cox that he was going to build an appurtenant structure on the premises to be used in his business.

As a result of these negotiations, the defendant Nationwide issued a homeowner's policy which bore effective dates of 17 December 1977 through 17 December 1980. The policy named James E. Durham, Jr. and wife, Penelope K. Durham, as the insured parties and named Mid-State Homes, Inc. as the loss mortgagee. This policy, as initially issued, afforded \$2,500 coverage on the appurtenant structure, described as a "garage building used for storage and upholstery work."

The subject policy provided the following language under coverage on appurtenant structures: "This coverage excludes structures used in whole or part for business purposes." Lines 49 through 52 on the back of the first page of the policy contain the

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following language: "No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto."

Plaintiffs subsequently built a detached garage building or workshop on the premises and requested that the defendant Cox increase their appurtenant structure coverage to \$5,000. Plaintiffs contend and defendants deny that when James Durham requested increased coverage on the appurtenant structure he advised the defendant Cox the appurtenant structure was going to be used for storage and upholstery and refinishing. Further, that Durham advised Cox that his equipment and tools had not yet arrived, but that as soon as they did, he would want to change the insurance on it. As a result of the plaintiffs' request, Nationwide issued an "HO-48" in June, 1978 which changed the appurtenant structure coverage under the homeowner's policy by increasing it to \$5,000. An HO-48 is an endorsement used in the insurance industry for the purpose of increasing the limit of liability, as specified in the original policy, on an appurtenant structure. The June, 1978 HO-48 also described the subject appurtenant structure as a "garage building used for storage and upholstery work."

Subsequently, James Durham installed his upholstery and refinishing tools in the structure and began openly operating his business in the building. Additionally, Durham was advertising his business extensively. The plaintiffs contend and the defendants deny that James Durham then went to Cox, advised him that he was at that time actively operating his upholstery business in the subject appurtenant structure and requested a premium quote on a policy of business insurance covering the appurtenant structure and the tools located therein. Durham stated in his deposition that Cox told him that for \$800 he could insure his tools, his building and the business itself and Durham decided that he could not afford such a high premium as he was just starting in business. The plaintiffs contend and the defendants deny that Cox then advised Durham that he could obtain additional coverage on the building by obtaining the issuance of a change endorsement on the homeowner's policy and that Cox further advised Durham that by increasing the appurtenant structure coverage under the homeowner's policy he would cover the building but not the tools.

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As a result, plaintiffs requested and Nationwide issued, effective December, 1978, an HO-48 which also described the appurtenant structure as a "garage building used for storage and upholstery work." As a result of the increased appurtenant structure coverage, the plaintiffs were billed for and paid an additional premium. These payments of premium were accepted by the defendants. No written waiver of the business use exclusion was obtained by plaintiffs. On 3 November 1979, the garage was destroyed by fire. The defendants refused and have failed to pay for the loss. We turn first to the issues raised by the grant of summary judgment in favor of the defendant insurance company and its agent on plaintiff's contract claim.

Summary judgment is the device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions of file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56; see 10 C. Wright A. Miller & Kane, Federal Practice and Procedure, § 2711 (1983). The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of material fact by the record properly before the court. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); 10A C. Wright A. Miller & Kane, *supra*, § 2727. In *Johnson v. Insurance Co.*, 300 N.C. 247, 253, 266 S.E. 2d 610, 615 (1980), our Supreme Court again delineated the nature of appellate review of the grant of summary judgment as a matter of law on a particular claim.

Summary judgment may not be imposed in a vacuum. The examination of the propriety of its entry must not conclude with the determination that there are no genuine issues of material fact. The very terms of Rule 56 require that it also be established that the movant be entitled to judgment as a matter of law. The second prong of the test may be effected only when the evidence which is offered in support of the motion is examined in light of the substantive rules of law as they relate to a plaintiff's claim for relief.

Defendants argue that summary judgment was correctly granted because the uncontradicted facts establish that at the time of the fire, the plaintiffs' garage was being used for business purposes; the policy by its terms excludes coverage of appurte-

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nant structures used in whole or in part for business purposes; such an exclusion is a matter of coverage which cannot be expanded by application of the doctrine of waiver or estoppel; and, there being no factual dispute, the insurance contract excluded as a matter of law coverage for plaintiffs' appurtenant structure.

Plaintiffs contend that the business use exclusion clause is a forfeiture provision which, despite policy provisions to the contrary, may be waived by the acts and/or conduct of the insurer and that genuine issues of material fact exist with respect to the question of waiver; specifically, whether the agent Cox had notice or knowledge of the business use to which the appurtenant structure was being put, in breach of the policy provision, at any relevant time prior to the time of the loss.

Our courts have long followed the general rule that the doctrines of waiver and estoppel are not available to bring within the coverage of an insurance policy risks not covered by its terms, or risks expressly excluded therefrom. *Hunter v. Insurance Co.*, 241 N.C. 593, 86 S.E. 2d 78 (1955); *McCabe v. Casualty Co.*, 209 N.C. 577, 183 S.E. 743 (1936); *Currie v. Insurance Co.*, 17 N.C. App. 458, 194 S.E. 2d 642 (1973). See generally Annot., 1 A.L.R. 3d 1139 (1965) and 16B Appleman, Insurance Law and Practice, § 9090 (1981).

In *Hunter v. Insurance Co.*, *supra* at 595-596, 86 S.E. 2d at 80, the Supreme Court quoted the following formulations of the majority rule:

"The doctrines of implied waiver and of estoppel, based upon the conduct or action of the insurer, are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom; and the application of the doctrine in this respect is, therefore, to be distinguished from the waiver of, or estoppel to deny, grounds of forfeiture."

* * *

"As a general rule, the doctrines of waiver or estoppel can have a field of operation only when the subject matter is within the terms of the contract, and they cannot operate radically to change the terms of the policy so as to cover ad-

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ditional subject matter. Accordingly, it has been held by the weight of authority that waiver or estoppel cannot create a contract of insurance or so apply as to bring within the coverage of the policy property, or a loss or risk, which by the terms of the policy is expressly excepted or otherwise excluded."

It is undisputed that the subject homeowner's policy contained a provision which excluded coverage for appurtenant structures "used in whole or in part for business purposes," and that James Durham was using his garage in connection with his upholstery and furniture refinishing business at the time of the fire. Thus, the initial question raised by this appeal is whether insurers can, by their acts and conduct, waive the right to rely upon a business use exclusion to avoid a homeowner's insurance policy.

Although our courts have found many policy provisions by which insurance companies seek to avoid liability to be forfeiture provisions, and therefore waivable, the question of whether a business use exclusion is a forfeiture provision is one of first impression in this jurisdiction. It would appear that the only provisions which thus far have been judicially determined to be conditions of coverage rather than forfeiture are age limitation provisions in life insurance policies. See *Hunter v. Insurance Co.*, *supra*, *McCabe v. Casualty Co.*, *supra*, and *Currie v. Insurance Co.*, *supra*. In these cases an evident concern of the courts was the imposition upon the insurer of risks which, by the terms of the policy, it is obvious that it elected not to assume.

The general rules as to waiver of conditions in property insurance policies working a forfeiture were stated by our Supreme Court in *Horton v. Insurance Co.*, 122 N.C. 498, 503-504, 29 S.E. 944, 945-946 (1898), and may be summarized as follows:

1. It is well settled in this State that the knowledge of the local agent of an insurance company is, in law, the knowledge of the principal; that the conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer, and that such waiver may be presumed from the acts of the agent.

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2. When the insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it is treated as having waived their performance, and the assured may recover without proving performance, and that, too, even though the policy provides that one of its conditions shall be waived except by written agreement.

3. The breach of any condition in the policy, as against an increase of risk or the keeping of certain hazardous goods . . . or, indeed, the violation of any of the conditions of the policy, may be waived by the insurer, and a waiver may be implied from the acts and conduct of the insurer after knowledge that such conditions have been broken.

In *Horton*, the condition of a fire insurance policy stating that it should become void if foreclosure proceedings should be begun or notice given of the sale, by virtue of mortgage or deed, of any property covered by the policy, was held to be impliedly waived by the conduct of the insurer. The rule of waiver has also been applied to provisions regarding title and interest, *Aldridge v. Insurance Co.*, 194 N.C. 683, 140 S.E. 706 (1927); *Hicks v. Insurance Co.*, 226 N.C. 614, 39 S.E. 2d 914 (1946) (other or additional insurance provisions); *Fire Fighters Club v. Casualty Co.*, 259 N.C. 582, 131 S.E. 2d 430 (1963) (vacancy or unoccupancy clauses); *Supply Co. v. Insurance Co.*, 49 N.C. App. 616, 272 S.E. 2d 394 (1980); and *Faircloth v. Insurance Co.*, 253 N.C. 522, 117 S.E. 2d 404 (1960) (clauses controlling location and removal of personal property).

The general rule, implicitly recognized in the foregoing cases, is summarized in 8 Couch on Insurance 2d, § 37:781, p. 372 (1959), as follows:

Representations, warranties, and conditions with respect to the use and occupancy of premises or property insured may, like other provisions which are for the benefit of the insurer, be waived by it, or it may become estopped to set up such a statement or the breach of such a condition in defense to an action on the policy. *Similarly, conditions prohibiting change of use are for the benefit of the insurer, and may be waived by it or its authorized agent.*

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See also 17 Appleman, *supra*, §§ 9561 *et seq.*; §§ 9601 *et seq.* (provisions for avoidance of a fire policy for change of use or increase of hazard are forfeiture provisions subject to doctrines of implied waiver or estoppel) and 44 Am. Jur. 2d, Insurance, §§ 1571 *et seq.* (1982). See generally 45 C.J.S., Insurance, §§ 672 *et seq.* (1946).

We conclude that the "business use" provision regarding appurtenant structures in the subject homeowners policy is a condition working a forfeiture, which may be impliedly waived by the acts and conduct of the insurer. The doctrines of implied waiver and estoppel properly apply to such a provision since the property itself, an appurtenant structure, and the risk, loss due to fire, are already within the coverage of the policy. Compare *Hunter v. Insurance Co.*, *supra*. The difference between "accepted" and "excepted" risk is aptly pointed out in *Keistler Co. v. Aetna Ins. Co.*, 124 S.C. 32, 117 S.E. 70, 73 (1923), where the court stated:

The distinction between an accepted risk to be defeated by conditions set forth in the policy and an excepted risk is clear, and it is logical to hold that it takes a new contract to cover an excepted risk. By way of illustration: A. has a plantation on which there are 10 buildings. All are covered by a policy of insurance, but the policy provides that, in case A. shall store certain inflammable materials in any of the houses, then the insurance on that building shall instantly cease. That is an assumed risk, which will be void upon a condition subsequent. B. has a plantation upon which there are 10 buildings; 9 of them are covered by a policy of insurance. Building No. 10 is excluded from the policy. It is entirely logical to hold that it takes a new contract to include insurance on B.'s No. 10, but not on A.'s No. 10.

The policy provision concerning business use is analogous to the provision against storage of inflammable materials in the foregoing illustration in that both may be said to enhance a risk already assumed by the insurer. Therefore, a "business use" of the covered property may properly be considered as a condition subsequent, the occurrence of which renders the assumed risk voidable. Thus, the insurer, through its acts or conduct, may impliedly waive or be estopped to deny its right to avoid liability. It is evident, then, that application of these doctrines does not

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radically alter, or have the effect of "rewriting," the subject policy. Furthermore, conditions regarding permissible or prohibited uses to which the property may be put are clearly inserted in the policy for the benefit of the insurer and therefore may properly be waived by it or its authorized agent.

We note also that our holding is consistent with the treatment accorded property use provisions in other jurisdictions. *See Security Insurance Co. of New Haven v. Greer*, 437 P. 2d 243 (Okla. 1968) (stipulation limiting insurer's liability for loss of property fully within excepted impermissible uses may be impliedly waived); *De Noyelles v. Delaware Ins. Co.*, 78 Misc. 649, 138 N.Y.S. 855 (1912) (insured's breach of warranty of use of premises for dwelling purposes is waived where insurer issued policy and accepted premium with knowledge that the building was occupied by a drug store and a manicuring business). *But see Badger Mut. Ins. Co. v. Hancock*, 116 Ga. App. 262, 157 S.E. 2d 58 (1967) (insured could not recover for fire loss of garage, used for commercial purposes within homeowner's policy exclusion provision on the theory of estoppel where policy was first issued and renewed prior to prohibited use, separate premium was not charged for inclusion of garage and such additional coverage existed only under provision that garage was not used for commercial purposes).

Moreover, application of the doctrine of implied waiver in the case under discussion is particularly appropriate because all of the HO-48 endorsements issued to plaintiffs described the covered appurtenant structure as a "garage building used for storage and upholstery work." At the time James Durham applied for insurance, he listed his occupation as "upholstery" and stated that he was "self-employed." Durham contends that he informed the insurance company's agent that he intended to construct a garage to be used in his business prior to the issuance of the first two HO-48 endorsements covering the appurtenant structure. Once the garage was constructed and his business established therein, Durham again, according to his deposition, informed the agent Cox that he was using the structure in connection with his upholstery business. A third HO-48 was issued, increasing coverage to \$10,000 on a "garage used for storage and upholstery work." Thus, there is evidence that the insurance company, through its agent, expressly agreed to assume whatever enhanced risk was posed to the structure by plaintiffs' upholstery work.

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It is plaintiffs' contention that the facts show the insurer learned of conditions which would work a forfeiture under the terms of the policy after issuance of the initial homeowner's policy and prior to issuance of the subsequent HO-48 raising its liability to \$10,000; but that the insurer nonetheless failed to cancel the policy and charged and collected increased premiums. In *Faircloth v. Insurance Co.*, *supra*, the policy provided coverage against "All direct loss by fire . . . to the property described hereinafter while located or contained as described in this policy . . . but not elsewhere." Shortly after issuance of the policy, Faircloth advised the insurance agent that the property was being moved from the insured location in Raleigh to Shallotte. The agent instructed Faircloth to pay an additional charge to cover the cost of extending coverage to the new location, and the charge was paid. The Supreme Court held that by continuing to collect premiums on the policy and by failing to cancel the same, the insurance company had waived the right to rely upon the condition of forfeiture. In a similar situation, this Court, in *Stuart v. Insurance Co.*, 18 N.C. App. 518, 522, 197 S.E. 2d 250, 253 (1973), observed,

It cannot be assumed that the defendant intended to accept premiums upon a policy which it knew did not extend coverage.

Therefore, we conclude that the evidentiary forecast does not establish the fact that coverage under the policy was excluded as a matter of law.

Defendant Nationwide makes three further arguments with regard to this issue which we will briefly address. The first argument concerns the policy provision regarding waiver only by express written agreement. In *Horton v. Insurance Co.*, *supra*, the Supreme Court expressly stated that the insured, in a proper case, may recover on the theory of implied waiver, "even though the policy provides that none of its conditions shall be waived except by written agreement." 122 N.C. at 504, 29 S.E. at 946. Accordingly, we find no merit in defendant's first argument.

The second argument concerns the plaintiffs' notice of the business use exclusion. In *Supply Co. v. Insurance Co.*, *supra*, this Court laid the issue to rest as follows:

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The question of whether plaintiffs [the insured] had notice, constructive or actual, that the policy contained such a provision has *no bearing* on the liability of Reliance [the insurer]. *Such notice on the part of plaintiff would not estop plaintiffs from asserting coverage.* (Emphasis added.)

49 N.C. App. at 623, 272 S.E. 2d at 398.

In this third argument, Nationwide argues that, should this Court find that coverage is not excluded as a matter of law, any factual issue is between plaintiffs and defendant Cox. Nationwide contends that it was not put on notice of a condition that would void the policy by reason of either Durham's application or the endorsements describing the garage. In *Faircloth v. Insurance Co.*, 253 N.C. at 528, 117 S.E. 2d at 408, the Supreme Court stated that,

[I]n the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same.

Again, we find no merit in the argument by which defendant Nationwide seeks to avoid liability under the policy issued to plaintiffs.

In conclusion, we hold that insurance coverage for plaintiffs' loss under the terms of the policy is not excluded as a matter of law because the business use exclusion is a condition of forfeiture, subject to the doctrines of implied waiver and estoppel. Waiver of a forfeiture provision is a mixed question of law and fact. *Hicks v. Insurance Co.*, *supra*. In the case *sub judice* essentially all facts relating to the question of waiver are controverted. Plaintiffs contend and defendants deny that the company's agent Cox had knowledge of the business use to which the garage was being put at all relevant times. The disputed factual issue raised by the evidentiary forecast is material and essential to a determination of plaintiffs' right to recover under their contract of insurance. Therefore, entry of summary judgment in favor of defendants Cox and Nationwide was inappropriate, and the cause must be remanded to the Superior Court for trial.

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We briefly address one further issue raised by plaintiffs' alternative claim for relief. That is, whether the defendant insurance company may be held liable for the negligence of its agent Cox in failing to procure a fire insurance policy under generally accepted principles of agency law. The identical issue was presented and answered in the affirmative by this Court in *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 62 N.C. App. 419, 303 S.E. 2d 332, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 365 (1983) and *Harrell v. Davenport*, 60 N.C. App. 474, 299 S.E. 2d 308 (1983). Accordingly, summary judgment in favor of Nationwide on plaintiffs' alternative claim for relief on the basis of tort was also inappropriate on the basis of the record thus far presented.

Reversed and remanded.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. SAMUEL COFFEY

Nos. 8310SC258 and 8320SC331

(Filed 3 January 1984)

1. Arrest and Bail § 3.1— seizure of defendant's person

A defendant who had landed at an airport to refuel an airplane suspected of having transported marijuana was "seized" within the meaning of the Fourth Amendment when defendant started toward the refueled airplane and a deputy sheriff, though telling him that he was not under arrest, asked him if he would mind waiting while the ownership and correct identification number of the airplane were checked out and patted defendant down for weapons, since a reasonable person would have concluded that he was not free to leave and that he would be forcibly detained if he attempted to do so.

2. Arrest and Bail § 3.1— probable cause for arrest—collective knowledge of various officers

Information which justifies a warrantless arrest need not all be known to the arresting officer or officers, it being sufficient if the various officers who participate in an investigation and arrest have the probable cause information among them.

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3. Arrest and Bail § 3.4— trafficking in marijuana—probable cause for warrantless arrest

Officers had probable cause to make a warrantless arrest of defendant for trafficking in marijuana at the Raleigh-Durham Airport at which he had landed to refuel an airplane where three different law enforcement agencies had among them the following information: defendant's airplane had landed at the Monroe Airport in the middle of the night without using lights or contacting the control tower and was met by a van; the airplane took off from the Monroe Airport with a sheriff's car in hot pursuit and thereafter landed at the Raleigh-Durham Airport to refuel; the van which met the airplane was found to contain numerous bales of marijuana; in obtaining permission to land at the Raleigh-Durham Airport, the pilot falsely reported the airplane's number; and while waiting for the airplane to be refueled, the pilot falsely told officers that he and defendant had flown in from New Jersey. Therefore, defendant's motion to suppress evidence seized pursuant to his warrantless arrest was properly denied.

4. Criminal Law § 138— aggravating factor—position of leadership—insufficient evidence

The evidence was insufficient to support the court's finding as an aggravating factor in sentencing that defendant occupied a position of leadership in the commission of the crime of trafficking in marijuana. G.S. 15A-1340.4(a).

5. Criminal Law § 138— pecuniary gain aggravating factor

The trial court erred in finding the "pecuniary gain" aggravating factor where there was no evidence that defendant was hired to commit the crime.

6. Criminal Law § 138— unusually large amount of contraband aggravating factor

The trial court erred in finding the "unusually large amount of contraband" aggravating factor in imposing a sentence for trafficking in more than 100 pounds but less than 2,000 pounds of marijuana since the amount of contraband was an element of the offense. G.S. 90-95(h)(1)(b); G.S. 15A-1340.4(a)(1).

7. Criminal Law § 138— trafficking in marijuana—aggravating factor—contraband especially hazardous to community

In imposing a sentence for trafficking in marijuana, the trial court erred in finding as an aggravating factor that the contraband involved was especially hazardous to the well-being of the community since the premise upon which the Controlled Substances Act rests is that the substances so controlled are detrimental to the public.

8. Criminal Law § 138— improper aggravating factor—remand for resentencing

The case must be remanded for resentencing where the trial court erred in finding certain aggravating factors, notwithstanding the court properly found one aggravating factor and further found that each aggravating factor outweighed all of the mitigating factors.

APPEAL by defendant from *Farmer, Judge* and *Davis, Judge*.
Judgments entered 16 December 1982 in Superior Court, WAKE

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County and 29 November 1982 in Superior Court, UNION County. Heard in the Court of Appeals 28 October 1983.

On 2 August 1982 at approximately 1:30 a.m. Fred Floyd, a pilot with the Jordonaire Corporation, landed his airplane at the Monroe Airport in Union County. While he was sitting in the plane doing his post-flight paperwork he observed a dark van enter his hangar area and then travel toward airport hangar #1. Because of previous problems with unauthorized vehicles on the premises, Floyd telephoned the Union County Sheriff's Department, and while talking with the department dispatcher an airplane landed without lights and taxied, still without lights of any kind, toward hangar #1. Floyd reported this to the sheriff's dispatcher, who immediately telephoned the Charlotte Airport control tower operator, requesting that he identify the airplane that had just landed at the Monroe Airport, but the controller had no knowledge of either the plane or the landing. Meanwhile the dispatcher had radioed all deputies to be on the alert for the dark van, and at 1:45 a.m. a Union County Deputy Sheriff saw and stopped a dark van that was leaving Airport Road at its intersection with Old Highway #74; but while the officer was leaving his car and walking toward the van, it sped away. After a chase of several miles the van was stopped again at 1:57 a.m., but the driver escaped into the night. The van had twenty bales of marijuana in it.

Another deputy sheriff arrived at the Monroe Airport at 1:51 a.m. and shortly thereafter he heard an airplane engine crank up and saw a white aircraft with tail number N50PK moving on a runway apron. The officer turned on his car's blue light and chased the airplane, but it made a sharp turn onto the runway and took off. These events were reported to the Charlotte Airport control tower by the Sheriff's dispatcher, who stated that the aircraft was suspected of transporting marijuana, and requested that the plane be tracked by radar and that they be notified when it landed. The aircraft was tracked by radar until it landed at the Raleigh-Durham Airport at 2:32 a.m. In requesting landing instructions from the tower the pilot said the airplane's number was NP50P rather than N50PK. Upon being informed of the landing, the Union County Sheriff's dispatcher telephoned the Raleigh-Durham Airport, spoke with the air traffic controller and Airport Security Officer Lilly, and requested that the plane and

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its occupants be detained and identified. After the plane landed until 3 a.m. when its refueling was completed, the defendant and the pilot were in the Aero Services lobby drinking coffee, where Officer Lilly engaged them in casual conversation. Thereafter defendant and the pilot were detained at the airport by various officers for the purpose of clarifying the number and ownership of the plane, verifying the identity of the occupants, and different pretexts until they were formally placed under arrest at 5:10 a.m. Defendant's fingerprints taken pursuant to the arrest were subsequently found to match fingerprints found on the bales of marijuana that were in the van.

At approximately 3:35 a.m. Captain Waller of the Wake County Sheriff's Department requested permission to search the aircraft, which the pilot granted. During the search two bags were found; one contained a roll of silver duct tape and a wrapper, the other, a green plastic garbage bag, contained a piece of heavy duty plastic. These articles were left on the aircraft. At approximately 4:45 a.m., S.B.I. Agent Turberville, after obtaining the pilot's signature on a consent of search form, searched the aircraft again. In this search marijuana seeds and stems were found in the bottom of the green plastic garbage bag, which was seized as evidence, along with the other bag and its contents.

In Wake County, by a proper bill of indictment, defendant was charged with keeping and maintaining an aircraft for the purpose of keeping or selling marijuana in violation of G.S. 90-108(a)(7). In Union County, by a proper bill of indictment, he was charged with feloniously trafficking in marijuana by having in his possession and under his control marijuana in excess of one hundred pounds but less than two thousand pounds in violation of G.S. 90-95(h)(1)(b). In each case defendant filed a motion to suppress any and all evidence gathered as a result of his detention and arrest and the search of the aircraft. After hearings were conducted in Union County, the motion in that case was denied, and in that case, pursuant to G.S. 15A-979, defendant entered a guilty plea, subject to the final resolution of his motion to suppress, and was sentenced to prison for fifteen years and ordered to pay a fine of \$250,000. Then, pursuant to a plea bargain, defendant also pled guilty in the Wake County case, subject to the eventual determination of his motion to suppress in the Union County case, which has the same basis as the Wake County mo-

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tion. In the latter case the presumptive sentence of two years was imposed.

The two appeals have been consolidated by agreement.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Marshall H. Karro for the defendant appellant.

PHILLIPS, Judge.

In contending that his motion to suppress should have been allowed, defendant maintains that his detention and that of the airplane by the Wake County officers at the Raleigh-Durham Airport before he was formally arrested constituted an unlawful seizure in violation of the Fourth Amendment to the United States Constitution. The State responds that no seizure occurred until the defendant was formally arrested at 5:10 a.m. In our opinion neither party is correct.

The Fourth Amendment provides: "The right of people to be secure in their persons . . . against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause" The seizure of a person occurs when "in view of all the circumstances surrounding the incident a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L.Ed. 2d 497, 509, 100 S.Ct. 1870, 1877, *reh. denied*, 448 U.S. 908, 65 L.Ed. 2d 1138, 100 S.Ct. 3051 (1980). In *Mendenhall*, the following factors were listed as examples of circumstances which might indicate a seizure: (a) the threatening presence of several officers, (b) the display of a weapon by an officer, (c) some physical touching of the person, and (d) the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

[1] Evidence offered at the suppression hearing tends to show the following: By 3 o'clock the morning involved, when defendant's airplane had been refueled and he was ready to leave the Raleigh-Durham Airport, a uniformed security officer and several armed deputy sheriffs were there; the Union County Sheriff's Department had twice requested that the plane and its occupants

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he detained for investigation and the State Bureau of Investigation, which had been drawn into the investigation by the Union County authorities immediately after the plane took off, had notified one of its Raleigh agents to go to the Raleigh-Durham Airport and detain defendant and the airplane; upon defendant starting toward the aircraft, a deputy sheriff, though telling him he was not under arrest, asked if he would mind waiting while the ownership and correct number of the airplane was checked out, and when defendant acquiesced, he was spread-eagled against a car and patted down for weapons. At 3:10 a.m., though defendant was again told that he was not under arrest, he was also told he was "being detained for investigative purposes." At 3:30 a.m. when defendant walked toward the aircraft he was again "asked" by an officer if he would mind staying with them awhile longer. At approximately 3:35 a.m. Captain Waller, an armed undercover agent, advised defendant that an investigation was underway and said, in effect, that if everything was cleared up he would be free to leave. Later, an S.B.I. agent arrived and questioned him; and not long after that when defendant again started to leave he was formally placed under arrest. Some of the officers involved testified that they had no basis for forcefully detaining defendant until shortly before he was arrested and did not try to do so.

Though the trial judge concluded that defendant was free to leave anytime he chose during the first two hours or so he was at the airport, we are of the opinion that defendant was seized at 3 a.m. Under the circumstances that then existed, a reasonable person would have concluded, it seems to us, that he was not free to leave and if he attempted to do so he would be forcefully detained. Having determined that, we must next determine whether the requisite probable cause existed for the seizure.

[2] Whether the officers had probable cause to seize defendant depends upon "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 13 L.Ed. 2d 142, 145, 85 S.Ct. 223, 225 (1964). This does not mean, however, that the information which justifies a warrantless arrest must all be known to the arresting officer or officers; it is sufficient if the various officers who participate in an investigation and arrest

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have the probable cause information between them. This principle has been applied and adhered to in many cases. In *United States v. Pitt*, 382 F. 2d 322, 324 (4th Cir. 1967), in responding to a contention that the arresting officer must have *personal* knowledge of the facts constituting probable cause, the Court said: "Probable cause, however, can rest upon the *collective* knowledge of the police, rather than solely on that of the officer who actually makes the arrest." (Emphasis in original.) The reason for this was explained in *Moreno-Vallejo v. United States*, 414 F. 2d 901, 904 (5th Cir. 1969), *cert. denied*, 400 U.S. 841, 27 L.Ed. 2d 76, 91 S.Ct. 82 (1970), where it was said:

The courts have had occasion to recognize that effective police work in today's highly mobile society requires cooperative utilization of police resources. They have, accordingly, asserted that knowledge in one sector of a police system can be availed of for action in another, assuming some degree of communication between the two.

United States v. One 1975 Pontiac Lemans, 621 F. 2d 444 (1st Cir. 1980); *United States v. Ashley*, 569 F. 2d 975, *reh. denied*, 573 F. 2d 85 (5th Cir.), *cert. denied*, 439 U.S. 853, 58 L.Ed. 2d 159, 99 S.Ct. 163 (1978); and J. Hall, *Search and Seizure* § 5-30 (1982) are to the same effect. Implicitly, if not explicitly, *Chambers v. Maroney*, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975, *reh. denied*, 400 U.S. 856, 27 L.Ed. 2d 94, 91 S.Ct. 23 (1970) stands for the same proposition.

[3] The investigation of this crime and arrest of the defendant required the efforts of three different law enforcement departments—the Union County Sheriff's Department, the Wake County Sheriff's Department, and the State Bureau of Investigation. In a short space of time, these three agencies gathered and received information from various sources and each other and extensively communicated with each other about the information obtained. The issue, therefore, is: Whether the three law enforcement groups between them had sufficient information to reasonably justify the belief at 3 o'clock that morning that a crime had been committed and defendant was involved in it. We believe that they had. They had information which, among other things, indicated that: In the middle of the night, for no known or apparent legal purpose, defendant's plane landed and taxied without lights at the

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Monroe Airport at about the same time a dark van, also without authority and for no known legal purpose, approached where the plane was; the plane's landing and departure were made without contacting either the control tower at the nearby Charlotte Airport or anyone in authority at the Monroe Airport; after taking off from the Monroe Airport with a blue-lighted sheriff's car in hot pursuit, the plane stayed in the air until it landed at Raleigh-Durham and defendant was on the plane when it landed; shortly after the plane took off the van was seen near the Monroe Airport on Airport Road and when ran to ground a few minutes later it contained numerous bales of marijuana; in obtaining permission to land at Raleigh-Durham Airport the pilot falsely reported the plane's number; and while waiting for the plane to be refueled, in defendant's presence, he falsely told the officers he and defendant had flown in from New Jersey. These circumstances gave the officers reasonable grounds for believing that: The bales of marijuana, which ended up in the fleeing van, probably came from the defendant's airplane, the transfer was accomplished during the surreptitious midnight rendezvous of the two vehicles at the Monroe Airport, and defendant had knowledge of these facts. We therefore hold that the warrantless seizure of the defendant by the Wake County authorities at 3 o'clock that morning was lawful and the motions to suppress the evidence obtained pursuant thereto and dismiss the case were properly disallowed. That the officers apparently were under the impression that they did not have sufficient basis to arrest defendant earlier than they did is beside the point; the defendant's rights are governed by the law, rather than by the officers' misunderstanding of it.

Defendant next contends that the search of the aircraft was illegal because the consent to search was not given voluntarily. This contention is based upon the premise that he was illegally seized and that since no intervening events occurred to attenuate the consent to search the plane, the search was illegal. Suffice it to say, we have concluded that the seizure of defendant was proper. We have further examined the circumstances surrounding the two consents to search given by the pilot of the aircraft and find no evidence that they were obtained by coercion. We therefore conclude that both searches were freely consented to and neither search was unlawful.

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Defendant also raises the issues of whether there was sufficient probable cause for the issuance of arrest warrants and whether the evidence obtained from the search of the aircraft should be excluded as fruits of the poisonous tree. We do not reach these issues because of our determinations that the seizures were proper and the consents to search were freely given.

Defendant also brings forth and argues seven assignments of error in which he contends the trial court erred by finding or failing to find certain facts in his order denying defendant's motion to suppress. We need not reach these questions, since we have determined that although the trial court improperly concluded the defendant was not seized prior to his formal arrest, the order denying the motion to suppress was nevertheless correct, since defendant's seizure was lawful.

Finally, defendant excepts to the Union County trial court's judgment sentencing him to imprisonment for the maximum term allowed and fining him \$250,000. In doing so, the court found and used the following statutory factors in aggravation of the offense: (a) The defendant occupied a position of leadership in the commission of the offense; (b) The offense was committed for hire or pecuniary gain; (c) The offense involved an unusually large quantity of contraband; and (d) The defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement. The court found as an additional factor in aggravation "that the contraband in question was especially hazardous to the well-being of the community." The court found two factors in mitigation and found that each factor in aggravation outweighed all the factors in mitigation. Defendant contends that using each of the above factors as a basis for sentencing him to a longer term than the presumptive sentence for this offense violated the Fair Sentencing Act. With one exception, we agree.

[4-6] It was improper to find that defendant occupied a position of leadership in the commission of this crime, because the record contains no evidence to that effect and G.S. 15A-1340.4(a) requires that aggravating factors be found by a preponderance of the evidence. The record shows only that defendant participated in this criminal venture with his co-defendant Thomas Duis Ritz, who piloted the airplane; it does not show that either influenced, led,

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or had dominion over the other. It was also improper to use "pecuniary gain" as an aggravating factor to increase defendant's sentence because the crime defendant was charged with, trafficking in marijuana, inherently involved the hope for pecuniary gain. *State v. Huntley*, 62 N.C. App. 577, 303 S.E. 2d 330 (1983). Since this present case was appealed, the Legislature amended the Act to make explicit in regard to pecuniary gain what was only inferable before, namely, that the pecuniary gain factor is limited to cases where crime is committed for hire. No evidence that defendant was hired to commit this crime was before the court. It was likewise improper to find and use the "unusually large amount of contraband" factor because the amount of contraband involved was an element of the offense that defendant was charged with—trafficking in marijuana by having in his possession in excess of one hundred pounds but less than two thousand pounds—and G.S. 15A-1340.4(a)(1) provides that "evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." The State argues that since it had to show possession of only one hundred pounds in order to convict defendant, the poundage above that is usable in aggravation of the offense. We disagree. The Legislature would not have established a presumptive sentence for possessing between one hundred pounds and two thousand pounds of marijuana if it had intended to permit judges to punish possessors of different quantities of contraband between the two limits as they see fit.

[7] Finally, it was improper to use as an aggravating factor that the contraband involved was especially hazardous to the well-being of the community because that, too, is inherent to the crime that defendant was convicted of, and, for that matter, is why the Legislature made trafficking in marijuana a crime in the first place. Basic to the letter and spirit of the Fair Sentencing Act is that circumstances that are inherent in the crime convicted of may not be used as aggravating factors in order to increase the punishment beyond what the Legislature has set for the offense involved. The premise upon which the North Carolina Controlled Substances Act rests is that the substances so controlled are detrimental to the public; with that necessarily in mind the Legislature established presumptive sentences for the different crimes involving marijuana. If these sentences could be enlarged because of the same facts that caused them to be established in

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the first place, the Legislature's judgment in the matter would be of no effect. But finding and using as an aggravating factor that defendant had a previous conviction punishable by more than sixty days imprisonment was not improper. The basis for defendant's contention in this regard is that the State did not show whether defendant was or was not indigent in those convictions, and whether he was represented by or waived counsel, as G.S. 15A-1340.4 seemingly provides. Under *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983), it is up to the defendant to show that grounds exist for disregarding previous convictions that have been proven under the Act, and defendant made no such showing.

[8] The State argues that since the trial court found that each factor in aggravation outweighs all the factors in mitigation, the case need not be remanded for resentencing if any aggravating factor was properly found and considered. We disagree. Justice Meyer, writing for the Supreme Court in *State v. Ahearn*, stated:

[I]t must be assumed that every factor in aggravation measured against every factor in mitigation with concomitant weight attached to each, contributes to the severity of the sentence—the quantitative variation from the norm of the presumptive sentence. . . . For these reasons, we hold that in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.

307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

Because we find that the trial court's denial of defendant's motions to suppress and dismiss were proper, we affirm the defendant's convictions in Wake and Union Counties. The Union County case is remanded for resentencing in accord with the provisions of the Fair Sentencing Act and this opinion.

No. 8310SC258: Affirmed.

No. 8320SC331: Affirmed as to guilt; remanded for resentencing.

Judges WEBB and EAGLES concur.

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STATE OF NORTH CAROLINA v. JOHNNY ROBERT COLBERT

No. 8323SC346

(Filed 3 January 1984)

1. Searches and Seizures § 6— entering house with arrest warrant for two men—looking for second man—marijuana in plain view—properly seized

The trial court properly denied defendant's motion to suppress evidence of marijuana seized from his premises where the officers had obtained arrest warrants for two men, including defendant's brother, and upon arriving at defendant's trailer where the two men were supposed to be found, the officers knocked and heard someone inside say "come in"; the officers entered and identified defendant's brother, whom they immediately arrested; a subsequent search of the brother and two other men present disclosed at least one loaded pistol; two officers walked from the kitchen area into a back bedroom; and one of the officers testified that as he was looking for the other man named in the warrant, he saw in a bedroom closet a bag containing green vegetable matter which appeared to be, and subsequently proved to be, marijuana. The officers were justified in looking through the trailer for the second suspect and the marijuana was admissible under the plain view doctrine.

2. Jury § 6— voir dire of jury panel in absence of counsel—no prejudicial error

Even assuming that there is a right to the presence of defense counsel during the State's voir dire of the jury, that the court erred in proceeding in the absence of defense counsel, and that the error was of constitutional dimension, the error, if any, was nevertheless harmless beyond a reasonable doubt. Defense counsel, upon arrival, had full and fair opportunity to examine the panel which had been approved by the State. G.S. 15A-1443(b).

Judge BECTON dissenting.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 19 February 1982 in Superior Court, WILKES County. Heard in the Court of Appeals 17 November 1983.

Defendant appeals from a judgment of imprisonment, a portion of which was suspended, entered upon his conviction of felonious possession of marijuana.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

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WHICHARD, Judge.

[1] Defendant contends the court should have suppressed, on Fourth Amendment grounds, evidence of marijuana seized from his premises. The pertinent facts are as follows:

Officers had obtained arrest warrants for two men, including defendant's brother, and the complainant had indicated that the men would be at defendant's trailer. Upon arrival at defendant's trailer, the officers knocked and heard someone inside say "Come in." They entered and identified defendant's brother, whom they immediately arrested. A subsequent search of the brother and two other men present disclosed at least one loaded pistol.

Two officers walked from the kitchen area into a back bedroom. One of the officers testified on voir dire that he was looking for the other man named in the warrants. In the course of this walkthrough he saw in a bedroom closet a bag containing green vegetable matter, which appeared to be, and subsequently proved to be, marijuana.

The officers had seen someone run away when they approached the trailer. They subsequently found defendant outside and arrested him.

Defendant contends, citing *Steagald v. United States*, 451 U.S. 204, 68 L.Ed. 2d 38, 101 S.Ct. 1642 (1981), that because the officers possessed only arrest warrants, and not a search warrant, they could not lawfully proceed beyond the kitchen area where they found his brother, who was the subject of one of the arrest warrants. *Steagald* requires that, to enter one person's residence in search of another for whom an arrest warrant is outstanding, officers must either possess a search warrant or meet one of the familiar exceptions to the warrant requirement, viz, consent or exigent circumstances. *Id.* at 211, 68 L.Ed. 2d at 45, 101 S.Ct. at 1647. The Court there stated: "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 212, 68 L.Ed. 2d at 45, 101 S.Ct. at 1647 (citing *Payton v. New York*, 445 U.S. 573, 590, 63 L.Ed. 2d 639, 653, 100 S.Ct. 1371, 1382 (1980)).

Here, however, defendant does not contest the validity of the initial entry into his trailer. The trial court found that an officer

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"went to the door of [defendant's] trailer and knocked and a voice from the inside said, 'Come in.'" It concluded "that the officers had a right to knock on the trailer; [and] that upon being invited in, they had a right to go in the trailer." Defendant has not excepted to the foregoing finding and conclusion. The finding thus is binding on appeal. *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E. 2d 590, 593 (1962); *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E. 2d 159, 161 (1982). It supports the conclusion as to the consensual nature of the initial entry, thus bringing it within one of the "special situations" in which a search warrant is not required. *Steagald*, *supra*, 451 U.S. at 211, 68 L.Ed. 2d at 45, 101 S.Ct. at 1647.

Defendant does except, however, to the conclusion "that after finding one of the persons that they had an arrest warrant for, the officers were justified in looking through the trailer for the second suspect." He thus presents an issue which exceeds the scope of *Steagald*.

Most courts which have faced this issue have approved walkthroughs of the entire premises at which an arrest has occurred. See 1 W. Ringel, *Searches & Seizures, Arrests and Confessions* § 12.6(a) (1983). "Such a walkthrough is reasonable when its purpose is to locate any other persons who are present on the premises who may pose a threat to the police." *Id.* at 12-28 to -28.1. Evidence in plain view during the course of such a walkthrough is subject to seizure under the plain view doctrine. *Id.* "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris v. United States*, 390 U.S. 234, 236, 19 L.Ed. 2d 1067, 1069, 88 S.Ct. 992, 993 (1968); see also *State v. Rigsbee*, 285 N.C. 708, 712-15, 208 S.E. 2d 656, 659-61 (1974).

Thus, in *United States v. Phillips*, 593 F. 2d 553 (4th Cir. 1978), *cert. denied sub nom. Speech v. United States*, 441 U.S. 947, 60 L.Ed. 2d 1050, 99 S.Ct. 2169 (1979), officers with arrest warrants entered an apartment and arrested two occupants who opened the door in response to their knocks. Although told that no one else was present, one officer nevertheless searched the apartment. In the course of this search he saw incriminating evi-

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dence which he seized and which defendants sought to suppress at trial.

The court found no error in admission of the evidence. It stated that the arrests were valid, and that the officers "looked around" only to ascertain whether a third occupant of the premises or other indicted persons were present "in order to assure their own safety and make additional arrests." 593 F. 2d at 556. It concluded: "The [officers], therefore, had a right to be where they were. The [evidence] was in 'plain view' and thus subject to seizure at the time of the arrests." *Id.*

In *State v. Carey*, 285 N.C. 509, 206 S.E. 2d 222 (1974), *death sentence vacated*, 428 U.S. 904, 49 L.Ed. 2d 1209, 96 S.Ct. 3209 (1976), officers entered a residence with consent and arrested two murder suspects. After the officers searched the rooms in which the suspects were found, one of them examined other parts of the house in search of a third suspect. While doing so, he observed a box of shotgun shells, which he took into his possession. Our Supreme Court held that the box was in plain view and the officer was where he had a right to be. It thus found no error in admission of the box into evidence.

Defendant has not excepted to the finding here that after an officer placed his brother under arrest, "he then walked to the back of the trailer looking for the other person for whom he had an arrest warrant." The finding is thus binding on appeal, *Anderson Chevrolet/Olds, supra*; and it establishes, as the purpose of the walkthrough, a search for the other suspect. Pursuant to the foregoing authorities, it thus supports the conclusion to which defendant excepts, *viz.*, "that after finding one of the persons that they had an arrest warrant for, the officers were justified in looking through the trailer for the second suspect."

The reasonableness of the conclusion is further supported by evidence that the officers had information that two persons named in the arrest warrants would be at defendant's trailer. They found and arrested one of the persons there. When they searched the person arrested and the other two men present, they discovered at least one loaded pistol. These circumstances indicate that a walkthrough of the premises was justified, both for the officers' protection and for the purpose of seeking the other person named in the warrants. Since the officers who con-

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ducted the walkthrough were thus where they had a right to be when they discovered the marijuana in plain view, the marijuana was admissible under the plain view doctrine.

We thus hold that the court did not err in denying defendant's motion to suppress. This holding renders immaterial the question of the validity of defendant's subsequent consent to a search of his premises.

[2] Defendant further contends the court committed prejudicial error in allowing the State to conduct its voir dire of the jury panel in the absence of his counsel. The record indicates that defendant was present, but that his retained counsel had been in another county and had arrived some fifteen to twenty minutes after jury selection commenced. The State had, by that time, passed on the panel. Defendant argues that he was thereby denied effective assistance of counsel.

A defendant in a criminal trial has the right to be present during selection of the jury. *Lewis v. United States*, 146 U.S. 370, 375-76, 36 L.Ed. 1011, 1014, 13 S.Ct. 136, 138 (1892); *State v. Hayes*, 291 N.C. 293, 297, 230 S.E. 2d 146, 148-49 (1976); *State v. Shackelford*, 59 N.C. App. 357, 358, 296 S.E. 2d 658, 659 (1982). Defendant was present during jury selection here.

Neither defendant nor the State has cited authority establishing a right to presence of defense counsel during such selection. Assuming, without deciding, that such a right exists, that the court erred in proceeding in the absence of defense counsel, and that the error is of constitutional dimensions, we nevertheless find the error, if any, harmless beyond a reasonable doubt. G.S. 15A-1443(b). Defense counsel, upon arrival, had full and fair opportunity to examine the panel which had been approved by the State. The record does not reveal any denials of defense challenges to prospective jurors, or that the jury might in any way have been biased against defendant, or that defendant had any basis whatever for dissatisfaction with the jury as constituted. In light of the evidence presented at trial, which we have held properly admitted, we are satisfied beyond a reasonable doubt that the error, if any, did not contribute to defendant's conviction. *Chapman v. California*, 386 U.S. 18, 23, 17 L.Ed. 2d 705, 710, 87 S.Ct. 824, 827, *reh'g denied*, 386 U.S. 987, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967). While the practice of proceeding in the

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absence of defense counsel is not approved, we hold that on this record it did not constitute prejudicial error warranting a new trial.

No error.

Judge HEDRICK concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Considering that (a) the right to counsel is among the most closely guarded of all trial rights, *State v. Thacker*, 301 N.C. 348, 271 S.E. 2d 252 (1980); (b) waiver of right to counsel will not be presumed from a silent record, *State v. Coltrane*, 307 N.C. 511, 299 S.E. 2d 199 (1983); and (c) jury selection is one of the most important parts of the trial, I find the trial court's action in allowing the prosecutor to question and pass on the jury in the absence of defendant's counsel so prejudicial as to warrant a new trial. In my view, the trial court's action deprived the defendant of his right to effective assistance of counsel during a critical stage of a criminal trial; it improperly placed more emphasis on the expedient disposition of cases than on the effective protection of defendant's rights.

The facts in this case compel a new trial. Defendant was represented by retained counsel of his choice. Defendant's attorney resided in Yadkin County; defendant's case was tried in Wilkes County. The case was called for trial in the middle of winter, February 19, 1981. The court had been informed that defendant's attorney was on his way to court at the time it ordered jury selection to begin.

The law compels a new trial. The peremptory challenge is "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408, 38 L.Ed. 208, 214, 14 S.Ct. 410, 414 (1894). "The denial or impairment of the right is reversible error *without a showing of prejudice*. [Citations omitted.] 'For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose.'" *Swain v. Alabama*, 380 U.S. 202, 219, 13 L.Ed. 2d

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759, 772, 85 S.Ct. 824, 835 (1965) (quoting *Lewis v. United States*, 146 U.S. 370, 378, 36 L.Ed. 1011, 1014, 13 S.Ct. 136, 139 (1892) (emphasis added). Further, this Court, the Supreme Court of North Carolina, and the United States Supreme Court have recognized the importance of jury selection. A defendant has a right to be present during the entire selection of the jury. *Lewis v. United States*; *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976); and *State v. Shackelford*, 59 N.C. App. 357, 296 S.E. 2d 658 (1982). Indeed, in *Shackelford*, this Court held that the defendant was entitled to a new trial because his attorney, without objecting, conducted the jury selection while defendant was not in court. This case presents the "flip side" of the situation facing the *Hayes* and *Shackelford* courts—the defendant was personally present, but without counsel. If jury selection is so important as to require the defendant's presence, then I believe it equally important to have defendant's counsel present. Compare *State v. Coltrane*, in which the order revoking defendant's probation was reversed because defendant's attorney was not present at the probation revocation hearing.

Separate and apart from the facts and law which, in my view, compel a new trial, are the practical reasons why defendant's counsel should be present during jury selection. A defendant needs counsel not only to speak for him in court, but also to observe and protect defendant from the sometimes intentional, but more often unintentional, improprieties that would adversely affect defendant's right to a fair trial. Now, I realize that there is no record of what the prosecutor or the potential jurors said, but that is no reason to assume that the jury selection procedure was "harmless." The fact that there is no record points out that the uncounseled defendant obviously did not know that the jury selection proceeding could have been recorded. See N.C. Gen. Stat. § 15A-1241(b) (1978).

The following quote is instructive:

While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. [Citation omitted.] It is often exercised upon the 'sudden impressions and unaccountable prejudices we are apt

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to conceive upon the bare looks and gestures of another. . . .'

Swain, 380 U.S. at 220, 13 L.Ed. 2d at 772, 85 S.Ct. at 836 (quoting *Lewis*, 146 U.S. at 376, 36 L.Ed. at 1014, 13 S.Ct. at 138). The practical view of human nature set forth in *Lewis* in 1892 is still valid today.

It is not uncommon for trial judges to be inattentive, or even to absent themselves from the courtroom, during jury selection. The trial lawyer who views jury selection as the most important part of the trial does not enjoy that luxury. The trial lawyer, at least on a subconscious level—and without regard to what has been labeled scientific jury selection techniques—evaluates jurors not only on what is said, but also on nuances and on how and when something is said. The manner in which jurors respond to opposing counsel's questions on *voir dire* is as important as the manner in which jurors respond to the questioning attorney. Was the juror too hesitant? Too eager? Too assertive? Too opinionated? Too conservative? Too liberal?

Verbal, as well as nonverbal, behavior is critically important when the trial attorney seeks to make a reasonably intelligent decision about exercising peremptory challenges during jury selection. Trial lawyers may not categorize their thought processes in terms of (a) paralinguistic cues (for example, speech disturbances, speed of speech, breath rate, pauses, and latencies); (b) kinesic cues (for example, eye contact, facial cues, and body postures and movements), or even (c) verbal cues, but we all use such communication cues in making evaluations about people.¹

In this case, when defendant's attorney arrived, the State had concluded its examination of the jurors and had passed the panel. I find the trial court's decision to proceed, in the absence of defense counsel, harmful error, and I vote for a new trial.

1. See generally Suggs and Sales, *Using Communication Cues to Evaluate Prospective Jurors During the Voir Dire*, 20 Ariz. L. Rev. 629, 632-38 (1978).

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STATE OF NORTH CAROLINA v. EDDIE LEWIS SMITH

No. 825SC1182

(Filed 3 January 1984)

1. Burglary and Unlawful Breakings § 5.7; Larceny § 7— breaking or entering—larceny—failure to give acting in concert instructions—insufficient evidence

Where the trial court failed to give instructions on acting in concert with regard to breaking or entering an automobile and larceny of a tool box therefrom, and where the State failed to show that defendant personally broke into or entered the automobile and that defendant personally took and carried away the tool box, defendant's convictions for breaking or entering the automobile and larceny of the tool box must be reversed.

2. Burglary and Unlawful Breakings § 1.2— constructive breaking

Evidence that an accomplice went through an open window of a house and then opened the front door for defendant to enter the house was sufficient to show a constructive breaking by defendant.

Judge JOHNSON concurring in part and dissenting in part.

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 20 April 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 31 August 1983.

Defendant was tried and convicted of first degree burglary, breaking or entering a motor vehicle, and larceny. He was sentenced to fifteen years in prison.

Attorney General Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant.

BECTON, Judge.

I

The State presented evidence tending to show that on 9 February 1982, defendant, Eddie Smith, and John Richardson were visiting at Jerome Chavis' house. Upon returning from the bathroom, defendant told Richardson, who testified for the State, that he had opened the bathroom window. They left Chavis' house and returned to defendant's house from which they went for a

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ride with Erick Kea. When they passed in front of Chavis' house, defendant told Kea to stop. Defendant produced keys that he had gotten from Chavis' work pants, and unsuccessfully tried to open the trunk of Chavis' car. Kea tried the key and opened the trunk. Kea and Richardson removed two tool boxes from Chavis' car and put them in Kea's car. Defendant then tried to open the door of Chavis' house with a key and failed. Remembering that he had opened the bathroom window earlier, defendant told Richardson to crawl through the window. With a boost from Kea and defendant, Richardson crawled through the window and opened the front door for Kea and defendant. The three then went into the bedroom and searched through some drawers, taking a camera and a shotgun, and removing a container of pennies from a table. When something dropped to the floor, awakening Mr. Chavis, defendant and Kea immediately ran from the house. After being recognized by Chavis, Richardson ran and caught up with the others.

Richardson returned to Chavis' house to retrieve a jacket he had left. He told Chavis that he would help him get his gun back if he would not call the police. Richardson shortly rejoined defendant and Kea in Kea's car. Later, as they were siphoning some gas from a school bus for Kea's car, the police drove up. Defendant ran, but Richardson and Kea were apprehended and arrested. The police searched Kea's vehicle with his consent and found the shotgun and tool boxes in the trunk.

Defendant presented evidence tending to show that although he was with Richardson at Chavis' house from about 9:30 p.m. until 10:30 p.m. on the night in question, he was at his girlfriend's house during the time of the alleged crimes. Defendant denied opening Chavis' bathroom window, taking Chavis' keys, or participating in any way with Richardson in the alleged crimes.

II

Because the trial court failed to instruct on acting in concert, defendant argues that the State had to satisfy the jury that defendant personally committed every element of the offenses charged. He thus argues that his convictions must be reversed because there was insufficient evidence that he personally committed every element of each offense. We agree with the defendant with regard to his breaking or entering a motor vehicle

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conviction and his larceny conviction. We disagree with defendant with regard to the burglary conviction.

A. The Breaking or Entering and Larceny Charges

[1] One indictment against defendant alleged that defendant broke and entered a motor vehicle in violation of N.C. Gen. Stat. § 14-56 (1981). However, the State's evidence showed that, although the defendant was at the scene, codefendant Kea actually unlocked and opened the automobile trunk, and Kea and Richardson reached into, and took two boxes out of, the trunk.

The defendant was also indicted for larceny of a tool box containing assorted tools, having a value of \$68.00, in violation of N.C. Gen. Stat. § 14-72 (1981). Two of the essential elements of larceny are (1) the taking of items and (2) the carrying away of the items. Again, the State's evidence showed that, although the defendant was present, Richardson and Kea did the actual taking and carrying away of the tool box.

Significantly, the trial court failed, with regard to the breaking or entering and larceny charges, to instruct the jury on the law of acting in concert. Because the jury was never told that it could convict defendant if it found that he acted in concert with others in the commission of the elements of each of the offenses, the State had to satisfy the jury that defendant personally committed every element of each offense. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981). This the State did not do. The only theory of the defendant's guilt submitted to the jury was that defendant actually committed every element of each of the offenses. The State's case must succeed or fail on that theory.

Our Supreme Court, in *State v. Cox*, upheld a trial court's failure to instruct on acting in concert because there was "much evidence" that all three defendants kidnapped the victim. Presciently addressing the effect of the trial court's failure to so instruct, the *Cox* Court said:

The trial judge's failure to instruct the jury in the present case on the law of acting in concert as it relates to kidnapping was therefore beneficial to defendants Covington and Godfrey. *In the absence of that instruction, the State had to satisfy the jury that each defendant committed every ele-*

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ment of the kidnapping offense in order to obtain a conviction for all three defendants. Had the instruction been given, the jury could have convicted all three defendants of kidnapping if it was satisfied beyond a reasonable doubt that one defendant committed all the elements of kidnapping, while the other two defendants were merely present at the scene and acting with the first defendant according to a common purpose or plan.

Id. at 86, 277 S.E. 2d at 383 (emphasis added).

The conclusion we reach on the breaking or entering and larceny charges, buttressed by *Cox*, is consistent with the long-held rule that a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury. For example, a conviction for felony larceny may not be based on the value of the thing taken when the trial court has instructed the jury only on larceny pursuant to burglarious entry. See *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969) and *State v. Hall*, 57 N.C. App. 561, 291 S.E. 2d 812 (1982).

Simply put, since the trial court failed to give acting in concert instructions with regard to the breaking or entering and larceny charges, and since the State failed to show that (a) the defendant personally broke or entered the motor vehicle; and (b) the defendant personally took and carried away the tool box, defendant's convictions for breaking or entering and larceny must be reversed.

B. The Burglary Charge

[2] Defendant was indicted for first degree burglary of Chavis' home in violation of N.C. Gen. Stat. § 14-51 (1981). The primary thrust of defendant's argument on this charge is that the State did not prove a breaking, one of the essential elements of burglary. The State's evidence showed that Richardson went through an open window and then opened the front door for defendant and Kea to enter the house. In burglary cases, both a breaking and an entering is required. However, a "constructive breaking is as sufficient a breaking for the purposes of this offense [burglary] as any physical removal by the defendant of a barrier to entry." North Carolina Pattern Jury Instructions—Criminal § 214.10, n. 1 (February 1977).

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Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads:

1. When entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened.

2. When, in consequence of violence commenced, or threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters.

3. When entrance is obtained by procuring the servants or some inmate to remove the fastening.

4. When some process of law is fraudulently resorted to for the purpose of obtaining an entrance.

5. When some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters; as, if one knocks at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being opened, enters. [Emphasis added.]

In all these cases, although there is no *actual breaking*, there is a breaking in law or by construction; 'for the law will not endure to have its justice defrauded by such evasions.' In all other cases, when no fraud or conspiracy is made use of or violence commenced or threatened *in order to obtain an entrance*, there must be an actual breach of some part of the house.

State v. Wilson, 289 N.C. 531, 539-40, 223 S.E. 2d 311, 316 (1976) (quoting *State v. Henry*, 31 N.C. (9 Ired.) 463, 467 (1849)).

The defendants' acts of procuring and using Richardson to open the door constituted a constructive breaking, obviating any need for instructions on acting in concert on the burglary charge.

III

The judgments of convictions in the breaking or entering and larceny cases are

Reversed.

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In the judgment of conviction on the burglary charge, we find

No error.

Judge BRASWELL concurs.

Judge JOHNSON concurs in part and dissents in part.

Judge JOHNSON concurring in part and dissenting in part.

I concur in the majority's opinion in reversing defendant's convictions for breaking or entering and larceny. I dissent in the majority's opinion in finding no error in defendant's conviction on the burglary charge.

Defendant argues that except under the theory of acting in concert, the evidence is insufficient to show that he committed the essential element of a *breaking*. In my opinion, defendant is correct. Burglary requires a breaking *and* entering. The State's evidence shows only that the defendant, with intent to commit a felony in violation of G.S. 14-54, entered the Chavis' home through an opened door; the door having in fact been opened by Tommy Richardson, an accomplice. Where a defendant is present with another person and with a common purpose does some act which forms a part of the offense charged, the judge is required to explain and apply the law of "acting in concert." *State v. Mitchell*, 24 N.C. App. 484, 211 S.E. 2d 645 (1975).

In my opinion, the majority errs in holding that the defendant *constructively* broke into the Chavis' home by procuring an inmate (Richardson) of the Chavis' home to open the door. Richardson, an accomplice, may not be properly characterized as an "inmate." An inmate is a person who "lodges or dwells in the same house with another, occupying different rooms but using the same door for passing in and out of the house." *Black's Law Dictionary* (4th Edition, 1951). None of the evidence shows or supports the inference that, at the time in question, Richardson was "lodging" or "dwelling" within the Chavis' home. Therefore, neither a breaking nor a constructive breaking by defendant was established by the evidence produced at trial, and consequently the trial court erred by failing to charge the jury on acting in concert. *State v. Mitchell, supra; State v. Cox*, 303 N.C. 75, 277 S.E.

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2d 376 (1981). The only theory of defendant's guilt that could properly be submitted to the jury on this evidence was that of acting in concert. This the trial court did not do. Nonetheless, defendant is not entitled to have the burglary conviction reversed. The State's evidence shows that the defendant entered the Chavis' home *through an opened door* with intent to commit a felony, in violation of G.S. 14-54, a lesser degree of the offense of burglary punishable by imprisonment not to exceed ten years under G.S. 14-1.1. Defendant was sentenced to a term of 15 years. Accordingly, the judgment and sentence imposed for first degree burglary should be vacated and the case should be remanded for resentencing. See *State v. Cox*, 281 N.C. 131, 187 S.E. 2d 785 (1972).

STATE OF NORTH CAROLINA v. OBBIE FORD, JR.

No. 8312SC305

(Filed 3 January 1984)

1. Criminal Law § 91.7— denial of motion for continuance—absence of witnesses—no abuse of discretion

The defendant failed to show that the denial of his motion for a continuance, which was grounded on defendant's attempt to contact and interview two potential alibi witnesses, was prejudicial error or an abuse of the trial court's discretion where defendant provided no affidavit or other proof in support of his motion at trial, and where on appeal, defendant offered no additional information as to when the potential witnesses would be available in order to justify a further delay. Since the defendant was given a fair opportunity to confront these potential alibi witnesses and ample time to prepare a defense with counsel, he was not denied his right to the effective assistance of counsel or his right of due process.

2. Criminal Law § 66.14— pretrial photographic identification—officer indicating choices of witnesses correct—independent origin of in-court identification

Where two witnesses stated that they viewed photographic lineups individually, that they related their selections to the detectives separately, and that their choice of photographs was based on what they had seen the day of the robbery and not due to the detective's influence or suggestion, the fact that the detective stated that the witnesses had selected the picture of the defendant whom he believed was one of the robbers, even if improper, did not prevent the trial court from allowing the in-court identification of the defendant if the in-court identification was of independent origin, and there was evidence that the witness's in-court identification of the defendant was of independent origin.

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APPEAL by defendant from *Britt (Samuel E.)*, Judge. Judgment entered 20 October 1982 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 November 1983.

Attorney General Edmisten by Assistant Attorney General Frank P. Graham for the State.

Assistant Public Defender John G. Britt, Jr., for defendant appellant.

BRASWELL, Judge.

The Summerhill Self-Service Station was robbed on 15 December 1981 at 8:00 a.m. by two black males. The jury convicted the defendant, identified as the shorter of the two men, of robbery with a firearm. Prior to trial, the judge refused to grant the defendant's fifth motion for a continuance and later at trial refused to grant his motion to suppress evidence in which two of the three eyewitnesses identified the defendant as the shorter robber. The defendant appeals from the denial of these motions. After a careful examination of the record, we hold that the motions were properly denied.

The State's evidence tended to show that at the time of the robbery three employees were on duty at the service station. Catherine Diane Fowler was working as the cashier when two black men entered the store. The taller of the two men, holding a gun, ordered Ms. Fowler to go back into the station's office. In this office were the other two employees, Don Smith and Claudia Skeen, who were in the midst of posting the previous day's sales and counting the money to be deposited in the bank. Once they were in the office, the taller man proclaimed, "This is a robbery," while the shorter robber placed approximately \$3,900 from the table into a bag. The taller man ordered the three employees on the floor, then fired his gun between Ms. Fowler and Mr. Smith as he and the other robber left.

Each employee was interviewed by detectives and shown photographic lineup displays on 29 March 1982. Each eyewitness viewed individually the two lineup displays containing six photographs of black men of similar ages and looks. All of the employees testified during the *voir dire* examination that neither the detective present nor anyone else suggested in any way

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which photograph they should select. On the basis of their observation of the men the day of the robbery, Ms. Fowler and Ms. Skeen selected the defendant's photograph as a picture of the shorter robber, but could not make a positive identification of the taller robber from the photographs. Mr. Smith picked two photographs, one from each lineup, as pictures of the two robbers but neither of these photographs were of the defendant. Detective Proctor who actually conducted the lineup display presentation stated that after all of the employees had selected the photographs he indicated that the photograph of the defendant selected by Ms. Fowler and Ms. Skeen was indeed a picture of one of the robbers. The State only offered as evidence the pretrial identifications of Ms. Fowler and Ms. Skeen. The defendant offered no evidence.

[1] The defendant's first assignment of error questions whether the trial court committed reversible error by denying his motion for a continuance. The record reveals that the trial was originally set for 26 July 1982. On that date the defendant was granted a continuance until 8 August 1982 to complete discovery and to continue plea negotiations in the case. The defendant was granted three additional continuances on these grounds, the last of which was to run until 16 September 1982. The defendant's trial was then calendared for 18 October 1982. On 14 October 1982, the defendant again moved for a continuance on the basis that the defendant "has attempted . . . to contact and interview S/Sgt. Anthony Bradley and Spec. 4 Thomas Miles" who "are potentially alibi witnesses for the defendant." The motion further provided "[t]hat defendant's attorney needs to talk to Bradley and Miles in order to ascertain if they would be useful as witnesses for defendant" and that the defendant's investigator has been informed that both men will be out of State on an Army training assignment and will not return prior to 18 October 1982. This final motion for a continuance was denied.

Ordinarily, a motion for a continuance, absent an abuse of discretion, is not reviewable. *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975). Yet if the motion is based on a constitutional right, denial of the motion presents a question of law, and not one of discretion, and is reviewable. *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977). Nevertheless, regardless of its nature, denial of a motion for a continuance is grounds for a new trial

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only upon a showing that the denial was error and that the defendant has been prejudiced by it. *State v. Lee*, 293 N.C. 570, 238 S.E. 2d 299 (1977). The defendant alleges in his brief that because the trial court refused to grant his motion for a continuance he was denied his constitutional right to the effective assistance of counsel and his constitutional right to due process of law. He attempts to establish that the denial of this motion denied him "the opportunity to develop and present a potential defense."

We find this case to be similar to *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981), where the defendant alleged he had been denied the effective assistance of counsel by the trial court's order granting him a continuance of only two days. In *Searles*, counsel was assigned to the defendant's case on 15 September 1980 and the case was originally calendared for 10 November 1980. The court even after having acknowledged that "the constitutional guarantees of assistance of counsel and confrontation of witnesses include the right of a defendant to have a reasonable time to investigate and prepare his case," stated that "[a]s a general matter . . . it is clear that defense counsel had more than ample time to confer with his client and any possible witnesses." *Id.* at 153-54, 282 S.E. 2d at 433. The court also found that it could not say as a matter of law that the trial court on the day the case was called for trial erred in not granting "a longer continuance for the purpose of locating a potential alibi witness." *Id.* at 154, 282 S.E. 2d at 434. (Emphasis in original.) Similarly, in the present case, defense counsel was appointed on 1 July 1982 and the case was finally calendared on 18 October 1982. Four days prior to trial, defense counsel also moved for a continuance in order to locate and to interview "potential" alibi witnesses. In the present case and in *Searles*, neither defense counsel made a meaningful attempt to inform the court the nature or contents of the potential alibi witnesses' testimony so as to provide the trial judge with a basis for determining whether the testimony would be material. Quoting *State v. Cradle*, 281 N.C. 198, 208, 188 S.E. 2d 296, 303, cert. denied, 409 U.S. 1047, 93 S.Ct. 537, 34 L.Ed. 2d 499 (1972), the *Searles* court stated that the defendant's motion

for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial and affords little basis to conclude that absent witnesses, if they existed, would ever be available. We are left

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with the thought that defense counsel suffered more from lack of a defense than from lack of time. 'Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for a continuance should be supported by an affidavit showing sufficient grounds. *State v. Gibson*, 229 N.C. 497, 50 S.E. 2d 520 (1948).' *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972).

Id. at 155, 282 S.E. 2d at 434. In the present case, defendant provided no such affidavit. In his motion and on appeal, he has offered no additional information as to when these potential witnesses would be available in order to justify a further delay. Since the defendant was given a fair opportunity to confront these potential alibi witnesses and ample time to prepare a defense with counsel (approximately 108 days), he has not been denied his right to the effective assistance of counsel or his right of due process. We hold that the defendant has not shown that the denial of his motion for a continuance was prejudicial error or an abuse of the trial court's discretion.

[2] The defendant's second assignment of error contends that the trial court committed reversible error by denying the defendant's motion to suppress identification evidence. Basically, our determination of this issue will turn on whether the detective's remarks to the eyewitnesses after they had made their identification tainted the out-of-court identification procedure. Normally, our first consideration would be to determine whether the "pre-trial identification procedure was so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Hammond*, 307 N.C. 662, 667, 300 S.E. 2d 361, 364 (1983). *See also*, *State v. Headen*, 295 N.C. 437, 439, 245 S.E. 2d 706, 708 (1978). Yet, the Supreme Court in *State v. Ricks*, 308 N.C. 522, 526, 302 S.E. 2d 770, 772 (1983), stated that "[w]e have consistently held that an in-court identification is competent, even if improper pretrial identification procedures have taken place, so long as it is determined on *voir dire* that the in-court identification is of independent origin."

After such *voir dire* examinations were held in the present case, the trial judge specifically found that the photographic lineup procedure used by Detective Proctor was not "unnecessarily suggestive and conducive to irreparable mistaken identification

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as to offend fundamental standards of decency, fairness and justice." These findings of fact are binding upon this Court if supported by competent evidence. *State v. Ricks*, *supra*, at 526, 302 S.E. 2d at 772; *see also*, *State v. Yancey*, 291 N.C. 656, 662, 231 S.E. 2d 637, 641 (1977). From our review of the *voir dire* transcript, we are of the opinion that the evidence supports the trial court's findings. Ms. Fowler, Ms. Skeen, and Detective Proctor were all examined by the trial court. Ms. Fowler and Ms. Skeen stated that they viewed the photographic lineups individually, that they related their selections to the detective separately, and that their choice of photographs was based on what they had seen the day of the robbery and not due to Detective Proctor's influence or suggestion. Detective Proctor testified that only after each witness had completed the identification procedure did he indicate that Ms. Fowler and Ms. Skeen had selected the picture of the defendant whom he believed to be one of the robbers. Even if Detective Proctor's remark was improper, the trial court could nevertheless allow the in-court identification of the defendant if the in-court identification was of an independent origin. *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967). The trial court in its order denying the defendant's motion to suppress found as a fact that "[t]he in-court identification of the defendant . . . by both Catherine Diane Fowler and Claudia Skeen is of independent origin based solely on what each observed on December 15, 1981 at the Summerhill Self Service . . . under well-lit conditions." Since this finding is supported by competent evidence obtained from the witnesses on *voir dire*, it is conclusive upon this Court. We hold that the trial court's ruling denying the defendant's motion to suppress was correct.

No error.

Judges ARNOLD and HILL concur.

State v. Malone

STATE OF NORTH CAROLINA v. CLARENCE C. MALONE, JR.

No. 8314SC315

(Filed 3 January 1984)

1. Attorneys at Law § 4; Criminal Law § 128.2— testimony for State by defendant's attorney—mistrial

The trial court did not err in declaring a mistrial when one of defendant's attorneys, who had been subpoenaed by the State, testified for the State where the attorney's testimony conflicted with the arresting officer's testimony as to what happened on the night defendant was arrested for driving under the influence and the attorney's credibility could be lessened considerably if the jury believed the officer, and where the court found that the attorney's testimony did in fact prejudice defendant. G.S. 15A-1063(1).

2. Automobiles and Other Vehicles § 126— driving with blood alcohol content of .10% or more—evidence of operation of vehicle and behavior after being stopped

In a prosecution in which defendant was convicted of driving with a blood alcohol content of .10% or more by weight, evidence concerning defendant's operation of the vehicle prior to the time he was stopped and of his behavior after he was stopped was admissible to substantiate the results of a breathalyzer test.

3. Automobiles and Other Vehicles § 126— driving with blood alcohol content of .10% or more—exclusion of testimony—harmless error

In a prosecution in which defendant was convicted of driving with a blood alcohol content of .10% or more by weight, the exclusion of an officer's testimony as to whether he was standing on the bumper of his car during surveillance of defendant, if error, was not prejudicial to defendant.

APPEAL by defendant from *Godwin, Judge*. Judgment entered 20 October 1982 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 November 1983.

Defendant appeals from a suspended sentence of thirty days in jail entered upon his conviction of operating a vehicle upon a highway or public vehicular area within the State of North Carolina when the amount of alcohol in his blood was 0.10% or more by weight.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

C. C. Malone, Jr., for defendant appellant.

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HILL, Judge.

On 15 August 1981 defendant was charged with the offense of driving under the influence of intoxicating liquor in violation of G.S. 20-138(a). Defendant was convicted of the lesser included offense of operating a motor vehicle upon the public street or highways of the State of North Carolina with a blood alcohol content of 0.10% or more in violation of G.S. 20-138(b), and appealed to superior court. Defendant, who is an attorney, was represented by two members of his law firm. When the case originally was called for trial in superior court, the State presented a written motion to disqualify defense counsel. The court did not rule on the motion, but permitted defense counsel to withdraw and granted defendant's *pro se* request for continuance. The second time the case was called for trial it resulted in a mistrial because the jury could not agree upon a verdict.

The case subsequently was called a third time, and the same attorneys from defendant's law firm appeared as counsel. No motion to disqualify defense counsel was made. The State called as a witness one of defendant's attorneys, who previously had been subpoenaed by the State. At the conclusion of his testimony, the court on its own motion ordered defense counsel disqualified from further participation in the case, declared a mistrial, and rescheduled the case for a later date.

When the case was called for trial again defendant made a motion to dismiss on grounds of double jeopardy. The motion was denied. The trial proceeded, and the jury found defendant guilty. Defendant appeals from the conviction and judgment.

[1] Defendant first contends that the court erred in denying his motion to dismiss on grounds of double jeopardy. He argues that the court did not have authority under G.S. 15A-1063 to declare a mistrial after the testimony of his attorney.

It is a basic precept of the common law, guaranteed by the Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense. U.S. Const. Amend. V; N.C. Const. Art. 1, § 19; *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Cooley*, 47 N.C. App. 376, 268 S.E. 2d 87, *appeal dismissed*, 301 N.C. 96, 273 S.E. 2d 442 (1980). A defendant's cherished

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right to have his liberty or life legally imperilled only once for a criminal charge does not, however, necessarily preclude retrial when previous proceedings against him have failed to conclude in a judgment of either conviction or acquittal. *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed. 2d 717 (1978). See generally Annot., 50 L.Ed. 2d 830, 841-42 (1978); 21 Am. Jur. 2d *Criminal Law* § 194, at 246 (1965).

State v. Williams, 51 N.C. App. 613, 617, 277 S.E. 2d 546, 548 (1981).

G.S. 15A-1063(1) provides that the court may declare a mistrial on its own motion if "[i]t is impossible for the trial to proceed in conformity with law." Prior to the enactment of G.S. 15A-1063 a court could declare a mistrial, over defendant's objection, due to "a physical necessity or the necessity of doing justice." *State v. Shuler*, 293 N.C. 34, 43, 235 S.E. 2d 226, 231 (1977) (quoting *State v. Beal*, 199 N.C. 278, 154 S.E. 604 (1930)); see also *State v. Birkhead*, 256 N.C. 494, 124 S.E. 2d 838 (1962).

Thus, we must decide whether G.S. 15A-1063(1) gives the court authority to declare a mistrial when one of defendant's attorneys testified for the State. A similar case is *State v. Cooley*, 47 N.C. App. 376, 268 S.E. 2d 87, *disc. rev. denied and appeal dismissed*, 301 N.C. 96, 273 S.E. 2d 442 (1980). In *Cooley* testimony was admitted showing that someone other than defendant or his attorney had bribed some of the jurors. The Court held that a court had authority under G.S. 15A-1063(1) to declare a mistrial

where it could reasonably conclude that a fair and impartial trial in accordance with law could not be had. As we view the language of these sections, the draftsman's comments, and the prior case law of this State, we do not believe the General Assembly intended to so limit the authority of trial judges to require that jury trials in criminal cases be free of improper influence. We believe the General Assembly intended to permit trial judges to grant mistrials in cases such as the one *sub judice* under G.S. 15A-1063(1), if constitutionally allowable.

47 N.C. App. at 383-84, 268 S.E. 2d at 92.

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A court has the authority to declare a mistrial because the conduct of the attorneys prejudices the fair consideration of the issues by the jury. *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed. 2d 717, 98 S.Ct. 824 (1978). Further, the North Carolina Code of Professional Responsibility provides that:

If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 5-102(B) (1974). Although matters relating to attorneys ordinarily are handled by the State Bar, courts also have authority in this area. *Swenson v. Thibaut*, 39 N.C. App. 77, 109, 250 S.E. 2d 279, 299 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979); *In re Bonding Co.*, 16 N.C. App. 272, 275, 192 S.E. 2d 33, 35, *cert. denied and appeal dismissed*, 282 N.C. 426, 192 S.E. 2d 837 (1972).

Here, the court found that "through the testimony of [defendant's attorney] some matter has been established by the State that is prejudicial to [defendant]." The court then declared a mistrial. A ruling on a motion for a mistrial is "addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion." *State v. Allen*, 50 N.C. App. 173, 176, 272 S.E. 2d 785, 787 (1980), *appeal dismissed*, 302 N.C. 399, 279 S.E. 2d 353 (1981); *see also State v. McCraw*, 300 N.C. 610, 620, 268 S.E. 2d 173, 179 (1980).

The attorney's testimony conflicted with the arresting officer's testimony as to what happened on the night defendant was arrested. If the jury chose to believe the officer, then the attorney's credibility, not only as a witness but as an attorney, was lessened considerably. Also, since the attorney had been subpoenaed prior to trial, defendant had notice that his attorney would be called as a witness and could have taken steps to avoid the situation. The court determined that the testimony did in fact prejudice defendant. As the United States Supreme Court once stated, "the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to

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the trial judge's evaluation [of whether a mistrial is necessary]." *Arizona v. Washington, supra*, 434 U.S. at 511, 54 L.Ed. 2d at 732, 98 S.Ct. at 833. We find no abuse of discretion and thus hold that the court did not err in declaring a mistrial.

[2] Defendant contends the court erred in admitting testimony relating to the offense of driving under the influence. Specifically, defendant contends the court should not have allowed evidence concerning defendant's operation of the vehicle prior to the time he was stopped and of his behavior after he was stopped. He contends this was not relevant to the offense of operating a motor vehicle upon the public street or highways of the State of North Carolina with a blood alcohol content of 0.10% or more.

"The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense." *State v. McClain*, 240 N.C. 171, 173, 81 S.E. 2d 364, 365 (1954). On the other hand, the mere fact that evidence tends to prove the commission of another crime does not automatically mean the evidence must be excluded. *Id.* at 177, 81 S.E. 2d at 368. As our Supreme Court once stated:

Evidence is relevant if it has any logical tendency to prove a fact at issue in a case, *Stansbury N.C. Evidence* 2d Ed. § 77, and in a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible and permissible. *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506; *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101; *State v. Ham*, 224 N.C. 128, 29 S.E. 2d 449.

State v. Arnold, 284 N.C. 41, 47, 199 S.E. 2d 423, 427 (1973).

Here, the fact in issue was whether defendant had a blood alcohol content of 0.10% or more. Although defendant registered a 0.10 on the breathalyzer test, there also was evidence that defendant had not had anything to drink in over three hours. The evidence complained of tended to substantiate the results of the breathalyzer test. Thus, it was admissible.

Defendant's next contention is that the court erred in sustaining the State's objections to questions directed to the arresting officer on cross-examination. The questions pertained to

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the actions of the officer in crossing the dividing line of the highway and any instructions he gave defendant after he was stopped. Defendant contends the evidence was relevant and should have been admitted. Assuming, *arguendo*, that the court erred in excluding the testimony, defendant has not met his burden of showing prejudice. Defendant must show that "had the error in question not been committed, a different result would have been reached." G.S. 15A-1443(a). Since evidence was presented on each of the elements of the offense, it is unlikely a different result would have been reached. Thus, the court did not err in excluding the testimony of the officer.

[3] Defendant contends the court also erred in excluding testimony of another officer. The relevant portion of the testimony is as follows:

Q. Would you describe your position as you stood on the bumper of your car?

Objection.

Sustained.

Q. If your honor, please—

COURT: THE OBJECTION HAS BEEN SUSTAINED.

Q. Did you stand up, sit down, or lay down on your bumper, officer?

OBJECTION.

SUSTAINED.

Defendant contends this evidence was relevant because it related to the circumstances leading to the surveillance and arrest of defendant. Other evidence was admitted, however, of what the officer saw in the parking lot. Further, defendant has failed to show that "a different result would have been reached" if the jurors had known the position of the officer on the bumper of his car.

No error.

Judges ARNOLD and WEBB concur.

State v. Milam

STATE OF NORTH CAROLINA v. MATTHEW MACK MILAM

No. 839SC475

(Filed 3 January 1984)

1. Criminal Law § 138— aggravating factor that lesser sentence would unduly depreciate the seriousness of crime—improperly considered

It was error for the trial court to find as factors in aggravation that the sentence was necessary to deter others and that a lesser sentence would unduly depreciate the seriousness of the crime since neither factor relates to the character or conduct of the offender.

2. Criminal Law § 154— submission of stenographic transcript on appeal—questioning failure to find mitigating factors—failure to indicate which pages of transcript supported mitigating factors precluding review

Where, pursuant to Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure, defendant chose to submit a stenographic transcript of the testimony presented at his trial and sentencing hearing but failed to place in an appendix to his brief the portions of the trial testimony which purportedly supported his contentions regarding any mitigating circumstances which the trial judge failed to find, and failed to otherwise indicate on which pages in the transcript such evidence could be found, the sheer volume of the transcript precluded the Court from addressing the questions presented by defendant regarding the trial judge's failure to find particular mitigating factors.

3. Criminal Law § 138— finding that jury took certain mitigating factors into account in its verdict—unsupported

The trial judge's finding that the jury took statutory mitigating factors "into account in its verdict" was unsupported and it was error for the trial judge to so find.

APPEAL by defendant from *Bailey, Judge*. Order entered 29 December 1982 in Superior Court, WARREN County. Heard in the Court of Appeals 6 December 1983.

Defendant, Matthew Mack Milam, was indicted for murder on 8 February 1982. Defendant entered a plea of not guilty, setting forth the defense of self-defense, the defense of another and accidental shooting. Four possible verdicts were submitted to the jury: (1) guilty of second degree murder; (2) guilty of voluntary manslaughter; (3) guilty of involuntary manslaughter; or (4) not guilty. The jury returned a verdict of guilty of involuntary manslaughter on 7 April 1982.

A sentencing hearing was held on 8 April 1982. The trial judge found two aggravating factors and two mitigating factors.

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However, the trial judge made further findings that the jury had considered such mitigating factors in its verdict, and refused to find other mitigating factors that defendant contended were supported by the record.

Ultimately, the defendant filed a motion for appropriate relief challenging the trial judge's findings in aggravation and mitigation. Although Judge Bailey agreed with defendant that there was no evidence in the record to support the further findings that the jury took either of the mitigating factors into account in its verdict, defendant's motion for appropriate relief was denied on the grounds that the trial court properly found two factors in aggravation and, therefore, properly imposed a sentence in excess of the presumptive term. Defendant appeals from the denial of his motion for appropriate relief.

Attorney General Edmisten, by Assistant Attorney General Barry S. McNeill, for the State.

Frank W. Ballance, Jr., P.A., for the defendant appellant.

JOHNSON, Judge.

This appeal from the denial of defendant's motion for appropriate relief raises the question of whether the sentence imposed is supported by the evidence introduced at the sentencing hearing. The evidence consisted of the transcript of defendant's trial for the murder of Franklin Jiggetts. Defendant argues *inter alia* that the trial court erred in finding as a factor in aggravation "that the sentence given is necessary to deter others from committing the same crime, and that a lesser sentence would depreciate the seriousness of the crime," inasmuch as this factor was presumably considered by the legislature in determining the presumptive sentence for this offense.

Initially, it should be noted that the defendant failed to set out a numerical exception to this finding, either in the trial transcript or in the record on appeal, as required by Rule 10(b) of the Rules of Appellate Procedure. However, in the order denying defendant's motion for appropriate relief from which this appeal was taken, the court notes the following:

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To the signing of the entry of the above order, the defendant in apt time objects and excepts and gives notice of appeal to the Court of Appeals.

Defendant also omitted to set out a numerical exception to this order, but does refer to the order under his "Grouping of Exceptions and Assignment of Error."

The Rules of Appellate Procedure are mandatory and failure to follow the Rules subjects defendant's appeal to dismissal. See *Marisco v. Adams*, 47 N.C. App. 196, 266 S.E. 2d 696 (1980). We have decided, however, to treat the purported appeal as a petition for writ of certiorari and allow it in order that we may decide the case on its merits.

[1] On 18 April 1982, a sentencing hearing was held in which defendant was given an eight year active sentence for involuntary manslaughter. Involuntary manslaughter is a Class H Felony with a presumptive prison term of three years and a maximum term of ten years. G.S. 14-18; G.S. 15A-1340.4(f)(6).

Pursuant to G.S. 15A-1340.4(a)(1), the trial court, in sentencing the defendant and again at the post-conviction motion hearing, found the following factors in aggravation:

15. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

16. Additional written findings of factors in aggravation.

The Court finds by a preponderance of the evidence that the sentence given is necessary to deter others from committing the same crime and that a lesser sentence would depreciate the seriousness of the defendant's crime and that this constitutes an aggravating factor in that it relates to the protection of the public by restraining offenders and providing a general deterrent to criminal behavior.

In mitigation, the trial court found two statutory factors:

4. The defendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.

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9. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

To each of these mitigating factors, however, the trial judge added the additional written findings, "which the jury took into account in its verdict."

In his brief defendant contends, and the record so discloses, that there was no evidence before the trial court upon which it could find that the jury considered these factors, the court not having inquired of the jury or conducted a hearing to elicit testimony on this issue. However, we turn first to the issue raised by the trial judge's finding of additional factor Number 16 in aggravation.

Recently, in *State v. Chatman*, 308 N.C. 169, 301 S.E. 2d 71 (1983), the Supreme Court held that, under G.S. 15A-1340.4(a)(1) (Cum. Supp. 1981) it was error for the trial court to find as factors in aggravation that the sentence was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. *Id.* at 180, 301 S.E. 2d at 78. Justice Meyer, writing for the court, commented:

These two factors fall within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to *the character or conduct of the offender*. (Emphasis in original.)

The state concedes that "there are no apparent grounds for distinguishing these cases," and that defendant is entitled to a new sentencing hearing because the judge erred in a finding in aggravation and imposed a sentence beyond the presumptive term. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

[2] Defendant raises additional issues in his brief concerning the trial judge's failure to find certain mitigating factors listed in G.S. 15A-1340.4(a)(2) which he argues were supported by a preponderance of the evidence. Pursuant to Rule 9(c)(1) and Rule 28(b)(4) of

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the Rules of Appellate Procedure, defendant chose to submit a stenographic transcript of the testimony presented at his trial and sentencing hearing and placed portions of the *sentencing hearing testimony* in the appendix of his brief. However, he failed to include those portions of the *trial testimony* which purportedly support his contentions regarding mitigating circumstances in the appendix, and failed to otherwise indicate on which pages in the transcript such evidence may be found. The appendix, therefore, erroneously contains only a record of defense counsel's arguments to the trial judge regarding evidence produced at trial in support of various mitigating factors, and not a record of the evidence itself.

In *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983), the Supreme Court stated that when evidence in support of a particular mitigating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it "would eviscerate the Fair Sentencing Act." Consequently, failure to find a mitigating factor under such circumstances constitutes reversible error. However, in order for the appellate court to make the determination of whether evidence of this nature was introduced at trial and at the sentencing hearing, the record on appeal must reveal *what the evidence is* in a direct and concise manner. The trial transcript in this case consists of some 250 pages. It is simply impossible for this Court to properly address the question presented by defendant regarding the trial judge's failure to find particular mitigating factors without, at the very least, specific references to the trial transcript pages where testimony supporting defendant's arguments may be found. Further review of the question presented in defendant's brief on this issue is therefore precluded.

[3] We make one further observation with respect to the trial judge's finding that the jury took statutory mitigating factors Nos. 4 and 9 "into account in its verdict." Inasmuch as there was no evidence of record to support such findings, it appears that the trial judge made these inferences from the fact that the jury failed to return a verdict of guilty of either second degree murder or voluntary manslaughter, but rather, found the defendant guilty only of the lesser included offense of involuntary manslaughter. Such an inference from the *bare fact* that the jury returned a verdict of guilty of a lesser included offense is untenable, as it

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would negate the possibility of a defendant receiving the benefit of consideration of otherwise clearly established factors in mitigation whenever a verdict of guilty of a lesser included offense of murder is returned. There is no indication contained in the Fair Sentencing Act that the Legislature intended this result, and it is clear that such an application of its provisions would "eviscerate" the Act just as surely as would the failure of the trial judge to find the mitigating factor in the first instance.

For the reasons set forth above, the defendant is entitled to a new sentencing hearing on his involuntary manslaughter conviction.

Vacated and remanded.

Judges ARNOLD and PHILLIPS concur.

DORIS MOON v. CENTRAL BUILDERS, INC., J. J. WILLIAMS, AND CHARLES GORDON

No. 8220SC1060

(Filed 3 January 1984)

1. Trial § 3.2— illness of witness—denial of continuance

The trial court did not abuse its discretion in the denial of the corporate defendant's motion for a continuance because of the illness of a key witness where the case had been continued several times before because of the witness's ill health; some six months earlier the court had advised defense counsel by letter that the case would not be continued again and suggested that the witness's deposition be taken as a precautionary measure; and this was done and excerpts from the deposition were read into evidence at the trial.

2. Frauds, Statute of § 6.1— inapplicability of license to use road and to other claims

The Statute of Frauds, G.S. 22-2, applies only to contracts to sell or convey an interest in land and does not apply to an agreement giving defendant a license to use a road upon plaintiff's land. Nor does the Statute of Frauds apply to quantum meruit, trespass or unlawful timber cutting claims.

3. Evidence § 45— plaintiff's opinion as to fair market value of property

The trial court properly admitted plaintiff's opinion as to the fair market value of her property even though no attempt was made to qualify plaintiff as an expert in the field of real estate values.

Moon v. Central Builders, Inc.

APPEAL by defendant Central Builders, Inc. from *Hairston*, Judge. Judgment entered 19 May 1982 in Superior Court, MOORE County. Heard in the Court of Appeals 29 August 1983.

Plaintiff owns a 112-acre tract of land on Bethesda Road in Moore County. In the spring of 1978 the county had a sewer building project underway in that vicinity, incident to which it had two easements across part of plaintiff's property—a thirty-foot permanent easement for the sewer and a fifty-foot easement for its construction. A woods road ran across the property from Bethesda Road to a small pond and clearing where plaintiff's son planned to build a home. The defendant company obtained the sewer construction contract and through its agents, the individual defendants, approached plaintiff about using the woods road in doing their work. After it was represented to her that the company would improve the road and her property would not be damaged during construction, plaintiff gave defendants oral permission to use the road, and for several months thereafter they used the road.

Without obtaining permission from plaintiff, defendant company extended the road from the pond to the easement, a distance of two hundred feet, which was accomplished by cutting a path twenty to twenty-five feet wide through previously uncut woods. It also damaged and cut down many other trees in several different places on plaintiff's property, including along the original woods road, in an area near the sewer and construction easement where many large concrete manholes to be used later in the project were stored, and between the construction right of way and the pond. Plaintiff knew nothing about any of these things until she visited the construction site in September of 1978 and saw the cleared spaces and piles of dead trees, branches, and other debris. Immediately thereafter, she notified defendants that unless they assured her that no further damage would be done to her property and steps were taken to correct the damage that was correctable and to compensate her for damage that could not be undone, they would not be allowed to continue using the road. After several weeks of unproductive discussion and correspondence between the parties, plaintiff directed defendants not to use any of her property except that which was within the construction easement, and had chains put across the woods road at different places.

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Sometime later the concrete manholes were removed from plaintiff's property and placed on the sewer easement, but the defendants failed to improve the woods road, repair any of the damage, or compensate plaintiff.

Plaintiff then sued defendants, alleging trespass, breach of express contract and implied contract, based on the unauthorized use of her land by defendants for their own benefit and profit. The parties waived trial by jury, and after hearing the evidence of the parties, the trial judge rendered verdict and judgment for the plaintiff against the corporate defendant in the amount of \$4,961.00. The individual defendants were acquitted of liability and are not involved in this appeal.

Van Camp, Gill & Crumpler, by Douglas R. Gill and Sally H. Scherer, for plaintiff appellee.

Knox and Kornegay, by Robert D. Kornegay, Jr., for defendant appellant.

PHILLIPS, Judge.

Though the defendant's eleven assignments of error run the gamut from the court refusing to continue the trial to the entry of judgment, none have merit and only four of them require discussion.

[1] Continuances are not favored by the law; they may be granted only for good cause shown and motions therefor are addressed to the sound discretion of the trial judge. Rule 40(b), N.C. Rules of Civil Procedure; *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). That defendant Williams, a key witness for the corporate defendant, was too ill to attend the trial is apparent from the record; and ordinarily that might have required the court to continue the case as requested. But the case, then more than three years old, had been continued several times before because of Williams' ill health, and about six months earlier the court had advised defendants' counsel by letter that the case would not be continued again and suggested that defendant Williams' deposition be taken as a precautionary measure. This was done and excerpts from the deposition were read into evidence at the trial. Under these circumstances we cannot say that the court's refusal to again continue the case exceeded the bounds of judicial discretion.

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[2] Nor was plaintiff's claim barred by the Statute of Frauds, as defendant contends, because the agreement permitting defendants to use plaintiff's land was not reduced to writing. The Statute of Frauds, G.S. 22-2, applies only to contracts to sell or convey an *interest* in land. Plaintiff's claim is not that she had sold an interest in her land to defendants, but that she had given them a *license* to use her road. A license to use land is not an interest in land. *Sanders v. Wilkerson*, 285 N.C. 215, 204 S.E. 2d 17 (1974). Thus, the Statute of Frauds has no application. Furthermore, no damages were awarded for breach of the alleged licensing agreement. Plaintiff's damages were awarded in quantum meruit, trespass, and for unlawfully cutting timber under G.S. 1-539.1. A quantum meruit claim, which is implied by law rather than agreed to by the parties, is not within the Statute of Frauds, *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E. 2d 430 (1971); nor, for that matter, are trespass or unlawful timber cutting claims.

[3] Nor was it error for the court to receive plaintiff's opinion as to the fair market value of her property, even though no attempt was made to qualify her as an expert in the field of real estate values. It has long been the law in this state that property owners may testify as to the fair market value of their property without being qualified as expert witnesses. *North Carolina State Highway Commission v. Helderman*, 285 N.C. 645, 207 S.E. 2d 720 (1974).

Finally, the evidence presented does support the court's findings, which in turn support the conclusions of law and judgment.

Affirmed.

Chief Judge VAUGHN and Judge WHICHARD concur.

Hall v. Hall

DORA KATHERN S. HALL v. WAYNE EUGENE HALL

No. 8312DC33

(Filed 3 January 1984)

Appearance § 1.1; Divorce and Alimony § 1— jurisdiction—leave to withdraw motion challenging court's jurisdiction—filing new motions to set aside the order of alimony—general appearance

By moving for leave to withdraw a motion challenging the court's jurisdiction over his person, defendant removed the preventive effect of that motion against the normal waiver effect of appearance for other purposes, and by then seeking leave to file a new motion to set aside the order for alimony *pendente lite* and child support, and receiving leave to file further motions as he saw fit, defendant requested and received "some relief in the cause." He thus became an actor in the cause, thereby submitting his person to the jurisdiction of the court. This general appearance obviated the necessity of service of summons.

APPEAL by defendant from *Hair, Judge*. Order entered 18 August 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 2 December 1983.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, and Blackwell, Thompson, Swaringen, Johnson & Thompson, P.A., by John V. Blackwell, Jr., for plaintiff appellee.

Reid, Lewis & Deese, by Marland C. Reid and Renny W. Deese, for defendant appellant.

WHICHARD, Judge.

I.

The issue is whether defendant, who was not served with summons, made a general appearance which entitled the court to exercise jurisdiction over him. We answer in the affirmative, and thus affirm the trial court.

II.

The following facts are not disputed:

Plaintiff-wife and defendant-husband separated while living in Okinawa. Plaintiff and the minor child born of the marriage moved to Fayetteville, North Carolina, where plaintiff purchased a home in her name and defendant's. Defendant has not been a

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legal resident of North Carolina since 1964. He has been a legal resident of Florida since 1972.

Plaintiff commenced this action against defendant seeking alimony, custody, and child support. Her attorney filed an affidavit averring that defendant had been served by certified mail with summons which was in fact received by one E. C. Hall, a person of suitable age and discretion who resides at defendant's dwelling house or usual place of abode.

Counsel for defendant thereafter moved that the action be dismissed for want of personal jurisdiction. The motion alleged that the attempted service had been received by defendant's father; that defendant was not a party who, when service of process was made, was present within the state; that he was not a party who, when service of process was made, was a natural person domiciled within the state; and that this is not an action which arises out of a marital relationship within this state.

The trial court entered findings and conclusions, awarded custody to plaintiff, and ordered defendant to pay alimony *pendente lite* and child support. In a subsequent order, from which this appeal was taken, it found as a fact, to which defendant has not excepted, that the following occurred thereafter:

[O]n February 10, 1982, Defendant filed a Motion to dismiss the action of the Plaintiff for lack of jurisdiction over the person of the Defendant and for insufficient service of process; that said Motion came on for hearing before this Court on June 1, 1982, wherein the Defendant moved the Court for leave to withdraw his Motion to dismiss for lack of jurisdiction and insufficiency of process to enable him to file a new Motion to set aside the Plaintiff's order and Defendant was granted leave to file further Motions as he saw fit; that on June 25, 1982, Defendant filed the present Motion to dismiss said action for lack of jurisdiction over the Defendant and to set aside the Order entered by this Court on January 13, 1982, but filed on April 26, 1982.

It concluded "[t]hat Defendant's appearance through counsel on June 1, 1982, requesting a withdrawal of his Motion to Dismiss for lack of jurisdiction and insufficiency of process, and obtaining leave to file further Motion is a general appearance within the

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meaning of G.S. 1-75.7(1), justifying the assumption of personum [sic] jurisdiction by this Court." It thereupon set aside its prior order, dismissed defendant's motion to dismiss, granted defendant thirty days to file further pleadings, and retained the cause for further orders.

From this order, defendant appeals.

III.

Because the order rules adversely to defendant as to the jurisdiction of the court over his person, he has the right of immediate appeal. G.S. 1-277(b).

IV.

Because defendant did not except to the above quoted finding regarding his 1 June 1982 appearance, it is presumed to be supported by competent evidence and is binding on appeal. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E. 2d 159, 161 (1982). The question is whether it sustains the court's conclusion that defendant has made a general appearance in the action.

"[A] general appearance will waive the right to challenge personal jurisdiction only when it is made prior to the proper filing of a Rule 12(b)(2) motion contesting jurisdiction over the person." *Lynch v. Lynch*, 302 N.C. 189, 197, 274 S.E. 2d 212, 219, *modified and affirmed*, 303 N.C. 367, 279 S.E. 2d 840 (1981). Defendant's initial action was the filing of a motion which, *inter alia*, sought dismissal pursuant to Rule 12(b)(2) for lack of jurisdiction over his person. Nothing else appearing, then, a subsequent general appearance would not have waived his right to challenge personal jurisdiction.

The above finding establishes, however, that while this motion was pending defendant moved for leave to withdraw it. He further sought leave to file a new motion to set aside plaintiff's order, and he was granted leave to file further motions as he saw fit.

"A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person: (1) Who makes a general appearance in an action" G.S. 1-75.7. The concept of a

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general appearance should be given a liberal construction. *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 248, 243 S.E. 2d 412, 414, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978). "[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E. 2d 279, 287-88 (1978) (quoting *In re Blalock*, 233 N.C. 493, 504, 64 S.E. 2d 848, 856 (1951)), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 183 (1979). Defendant must have asked for or received some relief in the cause or participated in some step taken therein. The test is whether he became an actor in the cause. *Williams v. Williams*, 46 N.C. App. 787, 789, 266 S.E. 2d 25, 27 (1980).

By moving for leave to withdraw his motion challenging the court's jurisdiction over his person, defendant removed the preventive effect of that motion against the normal waiver effect of appearance for other purposes. See *Lynch v. Lynch*, *supra*. By then seeking leave to file a new motion to set aside the order for alimony *pendente lite* and child support, and receiving leave to file further motions as he saw fit, defendant requested and received "some relief in the cause." He thus became an actor in the cause, thereby submitting his person to the jurisdiction of the court. This general appearance obviated the necessity of service of summons. *Simms v. Stores, Inc.*, 285 N.C. 145, 157, 203 S.E. 2d 769, 777 (1974); *Blalock*, *supra*, 233 N.C. at 504, 64 S.E. 2d at 856.

For the foregoing reasons, the order is

Affirmed.

Judges WEBB and WELLS concur.

State v. Bass

STATE OF NORTH CAROLINA v. EDWARD G. BASS, ET AL.

No. 8213SC1223

(Filed 3 January 1984)

1. Narcotics § 6— proceeding for return of seized airplane—reputation testimony not inadmissible hearsay

In a proceeding on an aircraft owner's application for the return and possession of an aircraft which had been used for trafficking in marijuana, testimony of a federal drug enforcement agent concerning the reputation of persons involved in trafficking the marijuana was not inadmissible hearsay since the purpose of the testimony was not to establish the truth of the statements but to show that the president of the company which owned the aircraft knew or had reason to believe that the aircraft would be used to smuggle drugs. G.S. 90-112.1(b)(ii).

2. Narcotics § 6— forfeiture of airplane used to transport marijuana

The trial court properly denied an aircraft owner's application for return and possession of a seized aircraft which had been used for trafficking in marijuana.

APPEAL by applicant Atlas Aircraft Corporation from *Clark, Giles R., Judge*. Judgment entered 25 January 1982 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 19 October 1983.

In late 1979, Atlas Aircraft Corporation (hereinafter Atlas) entered a conditional sales agreement with Carolina Dust & Spray (hereinafter CDS), whereby CDS would receive title and use of a DC4 aircraft (United States Registration number N27MA) only upon full payment of \$125,000 to Atlas by 1 April 1980. When the payment was not made, Atlas granted CDS an extension of time in which to make the payment. The aircraft was moved from storage in Tucson, Arizona, to Paris, Texas, where it was modified, allegedly being converted to a sprayer aircraft for CDS. On 31 July 1980, the aircraft was seized in Brunswick County with 9,820 pounds of marijuana on it. Those present were arrested and have entered guilty pleas to drug trafficking charges.

In July of 1981, Atlas filed an Application for Return and Possession of Seized Property. This application was filed as a motion in the cause in the criminal cases arising out of the seizure of the aircraft. After hearing, judgment was entered on 25 January 1982 denying Atlas' application for return and possession of the

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aircraft and ordering forfeiture of the aircraft. From this judgment, applicant Atlas appeals.

Attorney General Edmisten, by Associate Attorney General Charles H. Hobgood, for the State.

Merriman, Nicholls, Crampton, Dombalis & Aldridge, by Gregory B. Crampton and W. Sidney Aldridge, for applicant-appellant Atlas Aircraft Corporation.

James R. Prevatte, Jr. and R. Glen Peterson, for respondent-appellee Brunswick County Board of Education.

EAGLES, Judge.

[1] Atlas' first assignment of error is that the trial judge improperly allowed the state to present, through witness Fred McKinney, hearsay evidence. We disagree, because we find that McKinney's testimony concerning the reputation of the individuals involved was not offered to establish the truth of the statements.

McKinney testified, *inter alia*: that he was a state agent assigned to the Federal Drug Enforcement Office; that he had specialized in investigating aircraft and boat smuggling operations since 1975; that frequently aircraft used in drug smuggling were subject to a conditional sales agreement (to "give the owner a margin of safety . . . he could say he was in the process of selling it"); that the Kern-Cameron organization was well-known to law enforcement throughout the country; that the Kern-Cameron organization converted large military surplus aircraft to be used to smuggle illegal drugs into the United States; that the Russell Jack Kern who had been involved with drug-smuggling operations was the same Russell Jack Kern that earlier testimony had shown had owned an airfield where the DC4 aircraft belonging to Atlas was stored in Tucson, Arizona, and had arranged for it to be moved to Texas; that the F.A.A. ferry permit to move the DC4 aircraft belonging to Atlas listed Jack Kern as the registered agent of the owner; that McKinney's investigation revealed that there was no corporation listed with North Carolina's Secretary of State known as Carolina Dust and Spray; that the president of Atlas kept a car at Jack Kern's airport in Tucson, Arizona; that the Texas airport where the DC4 aircraft was stored pending

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modifications was owned by I. N. Burchinal, Jr.; that Burchinal had sold several airplanes that had been involved in drug smuggling; that an article in the Wall Street Journal mentioned Burchinal's airport as a base for smuggling airplanes and where aircraft were prepared for smuggling; and that Benjamin Widtfeldt, the president of Atlas, had sold several airplanes which later were seized while transporting marijuana. McKinney testified that much of this information came from law enforcement agency files.

Applicant Atlas would have us hold that McKinney's testimony was inadmissible hearsay. Whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence is hearsay. If offered for any other purpose, it is not hearsay. 1 Brandis, N.C. Evidence § 138 (2d rev. ed. 1982); see *State v. Miller*, 282 N.C. 633, 642, 194 S.E. 2d 353, 359 (1973).

Before seized property may be returned, a claimant must show, *inter alia*, "that he had no knowledge, or reason to believe, that it was being or would be used in the violation of laws of this State relating to controlled substances." G.S. 90-112.1(b)(ii). Since the president of Atlas denied any knowledge of illegal activity involving the aircraft, the State had the burden of negating that denial. McKinney's testimony was not presented to prove the truth of the connections between Atlas and Jack Kern and drug smuggling operations, but rather to show that the president of Atlas knew or had reason to believe that the DC4 aircraft would be used to smuggle illegal drugs because he knew or had reason to believe that Kern and others had reputations for dealing in illegal drugs and aircraft for smuggling illegal drugs. 1 Brandis, N.C. Evidence § 148 (2d rev. ed. 1982). The trial judge did not err in allowing McKinney's testimony or in refusing to allow applicant Atlas' motions to strike that testimony.

[2] Applicant Atlas also assigns as error the trial court's denial of Atlas' application for return and possession of the seized aircraft. Atlas asserts that the findings of fact and conclusions of law were not supported by competent evidence and that the judgment entered by the trial court was thereby incorrect. We have carefully examined the findings of fact and conclusions of law and hold that they were supported by competent evidence. The judgment

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denying Atlas' application for return and possession of the aircraft and ordering forfeiture of the aircraft is

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. LARRY DONNELL SIMMONS

No. 8310SC372

(Filed 3 January 1984)

1. Criminal Law § 163— failure to object to instructions—waiver of objection

Where the record established that at the end of its instructions, the court asked if there was a request for further instructions, and defense counsel responded in the negative, App. R. 10(b)(2) precluded assigning as error defendant's contention that the trial court erred in failing to summarize any of defendant's evidence or contentions in its instructions while fully summarizing the State's evidence and contentions.

2. Criminal Law § 138— aggravating factor of pecuniary gain improperly considered—aggravating factor of "great monetary value" properly available

In a prosecution for felonious larceny, where there was evidence that the victim had just returned from a trip and had \$2,500.00 in her billfold when it was taken, although the trial court improperly considered as an aggravating factor that the offense was committed for pecuniary gain, the trial court could properly find as an aggravating factor on remand that the offense involved a taking of property of great monetary value. G.S. 15A-1340.4(a)(1).

3. Criminal Law § 138— consideration of prior convictions

Defendant did not sustain his initial burden of raising the issue that the trial court erred in finding his prior convictions as an aggravating factor absent evidence and findings as to whether he was indigent and represented by counsel or waived counsel, and he is precluded from raising this issue on appeal.

4. Criminal Law § 138— failure to consider mitigating factor that defendant voluntarily acknowledged wrongdoing proper

Where the evidence tended to show that at no time did defendant acknowledge his wrongdoing, the trial court properly failed to consider the mitigating factor: "Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." G.S. 15A-1340.4(a)(2)1.

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ON certiorari to review judgment entered by *Godwin, Judge*. Judgment entered 3 March 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 28 November 1983.

Defendant appeals from a judgment of imprisonment entered upon his conviction of felonious larceny.

Attorney General Edmisten, by Assistant Attorney General Evelyn M. Coman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

WHICHARD, Judge.

GUILT PHASE

[1] Defendant contends the court erred in failing to summarize any of his evidence or contentions in its instructions while fully summarizing the State's evidence and contentions. He did not present evidence, but relies on evidence allegedly favorable to him elicited on cross-examination.

Defendant concedes that he did not object at trial, and that N.C. R. App. P. 10(b)(2) thus precludes assigning this failure as error on appeal. He argues, however, that failure to allow him the opportunity to object out of the hearing of the jury obviates the Rule 10(b)(2) requirement.

The record establishes that at the end of its instructions the court asked if there was a request for additional instructions. Defense counsel responded in the negative. This contention is thus without merit. See *State v. Bennett*, 308 N.C. 530, 535, 302 S.E. 2d 786, 789-90 (1983).

Defendant also argues that this Court should find "plain error" in the instructions. See *State v. Odom*, 307 N.C. 655, 659-61, 300 S.E. 2d 375, 378-79 (1983). Having reviewed the instructions and the whole record, we find no "plain error" such as to require a new trial despite defendant's failure to comply with Rule 10(b)(2). See *State v. Bennett, supra*, 308 N.C. at 535-36, 302 S.E. 2d at 790.

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SENTENCING PHASE

[2] Defendant contends the court erred in finding as an aggravating factor that the offense was committed for hire or pecuniary gain. Evidence that defendant was hired or paid to commit the offense is necessary to support a finding of this factor. *State v. Thompson*, 309 N.C. 421, 422, 307 S.E. 2d 156, 158 (1983); *State v. Abdullah*, 309 N.C. 63, 77, 306 S.E. 2d 100, 108 (1983). The record contains no such evidence, and this factor thus was improperly considered.

Defendant contends the court used, to prove the aggravating factors that the offense was committed for pecuniary gain and involved the taking of property of great monetary value, the same evidence used to prove an element of the offense. See G.S. 15A-1340.4(a)(1). Our holding above eliminates the "pecuniary gain" factor from consideration upon re-sentencing. The court is not precluded from finding the "taking of property of great monetary value" factor simply because defendant has been charged with larceny. Our Supreme Court has stated: "The *additional* evidence necessary to prove a taking or attempted taking of property of *great* monetary value is not evidence necessary to prove an element of felonious larceny." *State v. Thompson, supra*, 309 N.C. at 422, 307 S.E. 2d at 158.

The evidence here was that the victim had just returned from a trip and had \$2,500 in her billfold when it was taken. In light of this evidence and of *Thompson, supra*, we hold that the court could properly find as an aggravating factor that the offense involved the taking of property of great monetary value.

Defendant contends the court used the same evidence to prove the "pecuniary gain" and "great monetary value" factors in violation of the prohibition against using the same evidence to prove more than one factor in aggravation. G.S. 15A-1340.4(a)(1). Again, our holding that the "pecuniary gain" factor was improperly considered eliminates it from consideration upon re-sentencing. The violation complained of thus will not recur.

[3] Defendant contends the court erred in finding his prior convictions as an aggravating factor absent evidence and findings as to whether he was indigent and represented by counsel or waived counsel. He did not sustain his initial burden of raising this issue

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in the trial court, however, and thus is precluded from raising it on appeal. *State v. Thompson, supra*, 309 N.C. at 425-28, 307 S.E. 2d at 158-61.

[4] Defendant contends the court erred in failing to consider as a mitigating factor that when he learned there was a warrant for his arrest, he went to the police and turned himself in. He argues that his conduct was covered by the following statutory mitigating factor: "Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer." G.S. 15A-1340.4(a)(2)1.

At no time did defendant acknowledge his wrongdoing. Rather, he steadfastly, from the arrest stage through the sentencing stage, asserted his innocence. The statutory mitigating factor on which defendant relies is thus inapposite.

Defendant's reliance on *State v. Wood*, 61 N.C. App. 446, 300 S.E. 2d 903, *disc. rev. denied*, 308 N.C. 547, 302 S.E. 2d 884 (1983), is also misplaced. Defendant there acknowledged that he perpetrated a shooting, but pleaded self-defense. Here, by contrast, defendant consistently denied his involvement.

Because the sentence imposed exceeds the presumptive, and the court erred in finding "pecuniary gain" as an aggravating factor, the case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E. 2d 689, 701 (1983).

No error in the trial; remanded for re-sentencing.

Judges HILL and BECTON concur.

STATE OF NORTH CAROLINA v. ROBERT EUGENE MCINTYRE

No. 834SC492

(Filed 3 January 1984)

1. Criminal Law § 138— prior convictions as aggravating circumstance—sufficiency of proof

It was not error for the court to find that the aggravating factor of prior convictions had been proven by the preponderance of the evidence where the

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prosecuting attorney represented to the court that defendant had four prior convictions; defendant requested that the court not consider one of these on the ground that he had been indigent and not represented by counsel; defendant made no similar request as to the other three convictions, nor did he in any way deny their existence or validity; and he did not, at the sentencing hearing, object to the finding of fact as to prior convictions or tender any proposed findings of fact.

2. Criminal Law § 138— second degree murder—premeditation and deliberation as aggravating factor

In imposing a sentence for second degree murder, the trial court did not err in finding as an aggravating factor that defendant left the scene of the homicide, procured a gun, and returned to lie in wait to shoot the victim since these facts tended to prove that the killing was the product of premeditation and deliberation and thus could properly be used to enhance the sentence for second degree murder.

APPEAL by defendant from *Brown, Judge*. Judgment entered 22 September 1982 in Superior Court, ONSLOW County. Heard in the Court of Appeals 7 December 1983.

Defendant was charged with first degree murder and pled guilty to second degree murder. He appeals from a judgment of imprisonment for a term of forty years.

Attorney General Edmisten, by Assistant Attorney General John C. Daniel, Jr., for the State.

Gaylor, Edwards and McGlaughon, by Jimmy F. Gaylor, for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in finding as aggravating factors that (1) he had prior convictions punishable by more than sixty days confinement, and (2) he "left the scene of the homicide[,] procure[d] a gun[,] and returned to lie in wait to shoot the victim." We find no error.

I.

[1] The prosecuting attorney represented to the court that defendant had four prior convictions. Defendant, through counsel, requested that the court not consider one of these on the ground that he had been indigent and not represented by counsel. He made no similar request as to the other three convictions, nor did

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he in any way deny their existence or validity. He did not, at the sentencing hearing, object to the finding of fact as to prior convictions, nor did he tender any proposed findings of fact. *See State v. Davis*, 58 N.C. App. 330, 334, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). He did not object to the method used to establish his record, or challenge in any way the accuracy of the record as represented. *See State v. Massey*, 59 N.C. App. 704, 705-06, 298 S.E. 2d 63, 65 (1982). He did not sustain his burden of raising the issue of indigency or lack of assistance of counsel as to three of the four convictions. *See State v. Thompson*, 309 N.C. 421, 425-28, 307 S.E. 2d 156, 158-61 (1983). Under these circumstances it was not error for the court to find that the aggravating factor of prior convictions had been proven "by the preponderance of the evidence," G.S. 15A-1340.4(a).

II.

[2] The ground for defendant's argument that the court erred in finding as an aggravating factor that he "left the scene of the homicide[,] procure[d] a gun[,] and returned to lie in wait to shoot the victim" is that evidence of these facts was necessary to prove malice, an element of second degree murder, and thus could not be used to prove a factor in aggravation. G.S. 15A-1340.4(a)(1). This evidence tended to prove more than mere malice, however. It tended to prove that the killing was the product of premeditation and deliberation.

"Premeditation and deliberation are not elements of murder in the second degree." *State v. Melton*, 307 N.C. 370, 375, 298 S.E. 2d 673, 677 (1983). Our Supreme Court has expressly held that

when a defendant pleads guilty to murder in the second degree, a determination by the preponderance of the evidence in the sentencing phase that he premeditated and deliberated the killing is reasonably related to the purposes of sentencing. Such aggravating factors may be considered in determining an appropriate sentence for the killer.

Id. at 376, 298 S.E. 2d at 678. It stated further:

[A]s premeditation and deliberation are not elements of murder in the second degree, if a defendant charged with murder in the first degree pleads guilty to murder in the sec-

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ond degree, the sentencing judge may conclude . . . that for purposes of sentencing premeditation and deliberation have been established by a preponderance of the evidence and therefore may be used as an aggravating factor.

Id. at 378, 298 S.E. 2d at 679.

Unchallenged evidence presented to establish the factual basis for defendant's plea indicated that defendant and the victim had exchanged some words in a store, and the victim had snatched a dollar bill from defendant's hand. Defendant had told the victim that was the last dollar bill he would snatch from him. He had then gone to his father-in-law's house nearby, secured a shotgun, and waited behind the store. A girl had seen him behind the store and had asked what he was doing with the shotgun. Defendant had replied: "I'm going to blow his brains out when he comes out of the store." When she urged him not to do that, he responded "oh don't worry, I'm not going to shoot anybody else but him." After the shooting defendant had stated: "I did have every intention of killing him at the time." He had also said: "[R]ight now I hope he don't die, but my intention was to kill him."

This evidence clearly permitted a finding by a preponderance of the evidence that the homicide was a product of premeditation and deliberation. Pursuant to *Melton, supra*, the court could use such a finding as an aggravating factor to enhance the sentence.

Affirmed.

Judges WEBB and WELLS concur.

ROBERT E. LEE AND WIFE, PATRICIA R. LEE v. UNION COUNTY BOARD OF COMMISSIONERS, AND UNION COUNTY, AND DEVELOPMENT MARKETING ENTERPRISES, INC.

No. 8320SC71

(Filed 3 January 1984)

Municipal Corporations § 30.3— zoning ordinance improperly overturned

The trial court erroneously found that a petition for rezoning violated a portion of the county zoning ordinance which read that once the amendment

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has been denied, the same request shall not be instituted sooner than one year from the date of the denial since although the commissioners had granted an earlier petition and the appellate court had invalidated the grant of the first petition on procedural grounds, the reviewing court's actions, which occurred within a year before the new petition was filed, did not constitute a *denial* of the new petition. The local county board of commissioners is the only board with the authority to deny a rezoning petition under the local county zoning ordinance.

APPEAL by defendants from *Davis, Judge*. Judgment entered 13 August 1982 in Superior Court, UNION County. Heard in the Court of Appeals 7 December 1983.

Defendants appeal from a trial court judgment which declared the rezoning of a 10.055 acre tract by the Union County Board of Commissioners invalid.

Griffin, Caldwell, Helder & Steelman, P.A., by Thomas J. Caldwell, for defendant appellants Union County Board of Commissioners and Union County.

Joe P. McCollum, Jr., for plaintiff appellees.

No brief filed for defendant Development Marketing Enterprises, Inc.

BECTON, Judge.

I

On 21 July 1977, defendant, Development Marketing Enterprises, Inc. (Development) filed a petition to rezone a 10.055 acre tract from R-40 (Residential Rural) to R-20 (Single Family Residential). The Union County Board of Commissioners (Commissioners) granted Development's petition on 6 September 1977, but this Court, on 15 January 1980, declared the rezoning invalid because the defendants had failed to comply with the notice to adjoining landowners provision in the Union County Zoning Ordinance. On 3 April 1980 our Supreme Court denied defendants' petition for a writ of certiorari.

On 29 April 1980, Development filed a second petition to rezone the 10.055 acre tract from R-40 to R-20. The Commissioners granted Development's second petition on 8 July 1980. On 24 September 1980, plaintiffs, Robert E. Lee and his wife, Patricia

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R. Lee, property owners in Union County, instituted this action against the Commissioners, Union County, and Development, to have the rezoning declared invalid. On 13 August 1982, the trial court concluded that Development's second petition violated § 132, the one-year waiting period provision of the Union County Zoning Ordinance, and declared the rezoning invalid.

From the 13 August 1982 judgment, the Commissioners and Union County appeal.

II

The defendants' sole assignment of error relates to the trial court's conclusion that the second petition for rezoning violated § 132 of the Union County Zoning Ordinance. Section 132 reads, in pertinent part, as follows:

A petition for an amendment that has been denied in whole or in part or has been approved for a higher classification than requested shall not again be instituted sooner than one year from the date of the denial or approval, unless the Board of Commissioners after considering the advice of the Planning Board, shall find that there have been substantial changes in conditions or circumstances bearing on the application.

The defendants contend that the trial court erred in applying § 132 to the facts of this case. We agree.

The Union County Board of Commissioners is the only body with the authority to deny a rezoning petition under the Union County Zoning Ordinance. In this case, the Commissioners granted both petitions. This Court *invalidated* the grant of the first petition on procedural grounds. Our Supreme Court denied certiorari. A reviewing court's action does not constitute a *denial* of the petition under § 132.

The provisions of § 132 are directed at the Commissioners' *denial* of the petition on its merits. Section 132 gives the Commissioners the discretion to waive the one-year waiting period, if they find "substantial changes in conditions or circumstances bearing on the application." Otherwise, the Commissioners are given a one-year respite. Section 132 spares them the harassment

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of identical zoning petitions immediately resubmitted after a denial on the merits.

We find that the trial court erred by applying § 132 to this case. Additionally, we summarily reject the plaintiffs' cross-assignments of error. Therefore, the judgment is vacated, and this case is remanded.

Vacated and remanded.

Chief Judge VAUGHN and Judge HILL concur.

STATE OF NORTH CAROLINA v. TOMMY LEE BYNUM

No. 8326SC445

(Filed 3 January 1984)

1. Criminal Law § 119— refusal to give requested instruction

The trial court in a prosecution for possession of heroin did not err in denying defendant's request for an instruction that identity of the contraband as heroin was an element of the offense which the State was required to prove beyond a reasonable doubt where the request was made orally at the end of the charge and thus was not timely, and where the court had instructed on the substance of the request.

2. Criminal Law § 138— prior convictions as aggravating factor—sufficiency of proof

The trial court properly found that the aggravating factor of prior convictions had been proven by a preponderance of the evidence where the prosecuting attorney represented to the court, on the basis of an FBI printout, that defendant had several prior convictions punishable by more than 60 days' confinement, and defendant stated through counsel that he believed the representation to be accurate and that he did not object to it. G.S. 15A-1340.4(a).

3. Criminal Law § 138— prior convictions as aggravating factor—indigency and representation by counsel

The trial court did not err in finding the aggravating factor of prior convictions without finding whether defendant was indigent and was represented by counsel at the time of such convictions where defendant did not sustain his burden of initially raising the issue at trial.

4. Criminal Law § 138— possession of heroin—heroin addiction as mitigating factor—insufficient evidence

While heroin addiction could perhaps be considered as a mitigating factor in imposing a sentence for possession of heroin, the evidence in this case did

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not require the trial court to make such a finding. G.S. 15A-1340.4(a)(2)b and (d).

APPEAL by defendant from *Sitton, Judge*. Judgment entered 5 October 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 December 1983.

Defendant appeals from a judgment of imprisonment entered upon his conviction of possession of heroin.

Attorney General Edmisten, by Assistant Attorney General Elaine J. Guth, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

WHICHARD, Judge.

GUILT PHASE

[1] Defendant contends the court erred in denying his request for an instruction that identity of the contraband as heroin was an element of the offense which the State was required to prove beyond a reasonable doubt. The request was made orally at the end of the charge in response to the court's inquiry regarding objections or further requests for instructions. It thus was not timely, and whether to grant it was for the court's discretion. G.S. 15A-1231(a); *State v. Coward*, 296 N.C. 719, 725, 252 S.E. 2d 712, 716 (1979). The court had instructed on the substance of the request, which is all it was required to do. *State v. Sledge*, 297 N.C. 227, 235, 254 S.E. 2d 579, 584 (1979). We thus find no abuse of discretion in the refusal to give the tendered instruction.

SENTENCING PHASE

[2] Defendant contends the evidence was inadequate to prove the aggravating factor of prior convictions. The prosecuting attorney represented to the court, on the basis of an F.B.I. printout, that defendant had several prior convictions punishable by more than sixty days confinement. Defense counsel responded: "[W]e don't object to that. I believe that is an accurate representation of what his record is. He does have a number of prior records, and he served time on several of them." Defendant did not, at the sentencing hearing, object to the finding of fact as to prior convic-

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tions, nor did he tender any proposed findings of fact. *See State v. Davis*, 58 N.C. App. 330, 334, 293 S.E. 2d 658, 661, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). He did not object to the method used to establish his record, or challenge in any way the accuracy of the record as represented. *See State v. Massey*, 59 N.C. App. 704, 705-06, 298 S.E. 2d 63, 65 (1982). On the contrary, he stated through counsel that he believed the representation to be accurate, and that he did not object to it. Under these circumstances it was not error for the court to find that the aggravating factor of prior convictions had been proven "by the preponderance of the evidence," G.S. 15A-1340.4(a).

[3] Defendant contends the court erred in finding the aggravating factor of prior convictions without finding whether he was indigent, represented by counsel, or waived counsel at the time. He did not sustain his burden of initially raising the issue at trial, however, and this contention is thus without merit. *State v. Thompson*, 309 N.C. 421, 425-28, 307 S.E. 2d 156, 158-61 (1983).

[4] Defendant contends the court erred in failing to find as a mitigating factor that he was a heroin addict. He argues that this should have been found pursuant to G.S. 15A-1340.4(a)(2)b., which establishes as a mitigating factor that "[t]he defendant committed the offense under duress . . . or compulsion which was insufficient to constitute a defense but significantly reduced his culpability"; or pursuant to G.S. 15A-1340.4(a)(2)d., which establishes as a mitigating factor that "[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability."

Drug addiction is not *per se* a statutorily enumerated mitigating factor. It could perhaps be found to mitigate the offense, either under the rubric of the above stated enumerated factors, or otherwise as being "reasonably related to the purposes of sentencing." G.S. 15A-1340.4(a). The evidence at the sentencing hearing here would have permitted such a finding, but in our view it did not compel it. We thus hold this contention without merit.

No error.

Judges WEBB and WELLS concur.

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STATE OF NORTH CAROLINA v. ROGER DAN HARRIS

No. 8217SC1328

(Filed 3 January 1984)

1. Criminal Law § 138— pecuniary gain improperly considered

In a prosecution for larceny, the trial court erred in considering as an aggravating factor that the offense was committed for pecuniary gain since pecuniary gain is inherent in the crime of larceny.

2. Criminal Law § 138— aggravating factor that crimes involved great monetary value improperly considered

The trial court erred in considering as aggravating factors that the crimes involved great monetary value since the only evidence of value before the court was that which was necessary to show that the felony larcenies charged had been committed.

3. Criminal Law § 138— prior convictions improperly considered

The trial court erred in considering defendant's prior convictions as an aggravating factor since the only evidence supporting this factor was a statement by the district attorney that defendant had "a record of prior convictions," and since it was not even established that the convictions were punishable by more than 60 days' confinement. G.S. 15A-1340.4(e).

4. Criminal Law § 138— mitigating factor that restitution was made to victims— supported by evidence

The trial court erred in failing to consider as a mitigating factor that restitution was made to the victims of his larcenies since evidence supporting that factor was unrefuted.

APPEAL by defendant from *Collier, Judge*. Judgments entered 17 August 1982 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 19 September 1983.

Defendant was indicted on seventeen counts of conspiracy to commit larceny and eighteen counts of felonious larceny. He pled guilty to all counts pursuant to a plea bargain that consolidated the offenses into five separate groups for sentencing purposes. The trial court consolidated the charges according to the plea bargain, made findings in aggravation, and entered five judgments, each of which sentenced the defendant to six years independent of the other sentences, for a total of thirty years. All offenses involved here are Class H felonies, the presumptive sentence for which is three years. In each instance, the trial court found the following aggravating factors:

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The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

The offense was committed for hire or pecuniary gain.

The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement.

The trial court found no mitigating factors.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Appellate Defender Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

PHILLIPS, Judge.

In sentencing the defendant the Fair Sentencing Act was not complied with and this matter is remanded to the trial court for re-sentencing.

[1] Pecuniary gain is inherent in the crime of larceny, which the Legislature no doubt took into account when establishing a presumptive sentence for it, and the court erred in using that fact to increase defendant's sentence. *State v. Huntley*, 62 N.C. App. 577, 303 S.E. 2d 330 (1983).

[2] It was also error to use as an aggravating factor that the crimes involved great monetary value, because the only evidence of value that was before the court was the evidence that was necessary to show that the felony larcenies charged had been committed. *State v. Simpson*, 61 N.C. App. 151, 300 S.E. 2d 412 (1983).

[3] Too, since the only reference to defendant's prior convictions was a statement by the District Attorney that defendant had "a record of prior convictions," the defendant's contention that this aggravating factor was not properly established is also well taken. It was not even established that the convictions were pun-

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ishable by more than sixty days' confinement, as the statute requires. While the methods of proving such convictions stated in G.S. 15A-1340.4(e) are not exclusive, *State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982), proof of some kind is still necessary and a statement by the District Attorney, standing alone, is not proof.

[4] Finally, since defendant's evidence that restitution was made to the victims of his larcenies was unrefuted and apparently recognized by the State to be true, it was error for the court not to find a mitigating factor to that effect. *State v. Wood*, 61 N.C. App. 446, 300 S.E. 2d 903, *rev. denied*, 308 N.C. 547, 302 S.E. 2d 884 (1983).

Remanded for re-sentencing.

Chief Judge VAUGHN and Judge WHICHARD concur.

RALPH W. SPIVEY AND WIFE, BILL SPIVEY, AND BILLY WORTH SPIVEY v. LEVI PORTER AND WIFE, ALICE PORTER; CLYDE SPIVEY, SINGLE; JEWELL MERCER, WIDOW; RUBY RUSS AND HUSBAND, PAUL RUSS; LUCILLE SPIVEY, SINGLE; AND THELMA SPIVEY, SINGLE

No. 8213DC1301

(Filed 3 January 1984)

1. Adverse Possession § 4— adverse possession of lappage

Where the area in dispute was a lappage, and both parties had actual possession of part of it, plaintiffs, as junior claimants, could acquire title only to that portion as to which they showed actual possession.

2. Adverse Possession § 25— insufficient findings to support judgment

The trial court's judgment awarding title to a parcel of land to the plaintiffs by virtue of adverse possession under color of title cannot be sustained where there was no evidence in the record to support the court's finding that the parcel adversely possessed by plaintiffs measured 38 feet in width, and where the court found only that the alleged adverse possession was "open and notorious" but made no findings on the other elements of adverse possession.

APPEAL by defendants from *Wood, William E., Judge*. Judgment entered 6 May 1982 in District Court, COLUMBUS County. Heard in the Court of Appeals 27 October 1983.

Spivey v. Porter

McGougan, Wright & Worley, by D. F. McGougan, Jr., and Dennis T. Worley, for plaintiff appellees.

C. Franklin Stanley, Jr., for defendant appellants.

WHICHARD, Judge.

Plaintiffs filed a complaint alleging that they owned certain land, defendants owned adjacent land, and defendants had trespassed on their land by building a fence thereon. They sought damages, an order restraining further trespass, and a declaration that they were the owners of the land described. By stipulation the action was treated as a processioning proceeding with associated issues of title by adverse possession.

The court, without a jury, established the common boundary as described in deeds offered by both parties and as indicated by various monuments on the ground. In addition, it awarded title to a parcel of land to the plaintiffs by virtue of adverse possession under color of title.

The court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by them will be affirmed even though there is evidence contra. *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975). Where there is no evidence to support an essential finding of fact, however, and where conclusions are not supported by sufficient factual findings, the judgment cannot be sustained. *Quick v. Quick*, 305 N.C. 446, 453-54, 290 S.E. 2d 653, 659 (1982); *Trust Co. v. Lumber Co.*, 224 N.C. 153, 154, 29 S.E. 2d 348, 348 (1944).

[1] The area in dispute was a lappage, and both parties had actual possession of part of it. Plaintiffs, as junior claimants, could therefore acquire title only to that portion as to which they showed actual possession. *Price v. Tomrich Corp.*, 275 N.C. 385, 393, 167 S.E. 2d 766, 771 (1969). The extent of plaintiffs' possession thus constituted an essential feature of the judgment.

[2] The court found that the parcel adversely possessed by plaintiffs measured thirty-eight feet in width. The record, however, reveals no evidence to support this figure. The finding thus is not sustained by the evidence, the judgment cannot be sustained by

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the finding, and the case must be remanded. *Howard v. Boyce*, 254 N.C. 255, 266, 118 S.E. 2d 897, 905 (1961).

The court also found only that the alleged adverse possession was "open and notorious." It made no findings on the other elements of adverse possession. See *Price v. Tomrich Corp.*, *supra*, 275 N.C. at 393-95, 167 S.E. 2d at 771-73; *Whiteheart v. Grubbs*, 232 N.C. 236, 243, 60 S.E. 2d 101, 105 (1950); *Campbell v. Mayberry*, 12 N.C. App. 469, 183 S.E. 2d 867, *cert. denied*, 279 N.C. 726, 184 S.E. 2d 883 (1971); J. Webster, Webster's Real Estate Law in North Carolina § 287 (Rev. ed. 1981). For example, despite conflicting evidence thereon, the court made no finding on the element of hostility. It also did not make a finding on the element of exclusiveness. *Price v. Tomrich Corp.*, *supra*.

Neither side challenges the line established as the remaining common boundary. That issue thus need not be relitigated upon remand.

The case is remanded for further proceedings consistent with this opinion.

Remanded.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA v. HERMAN QUEEN, JR.

No. 8327SC536

(Filed 3 January 1984)

Criminal Law § 163— failure to object to charge—waiver of right to assert error on appeal

In a prosecution for committing a crime against nature where the defendant failed to object to the instructions to the jury or to evidence introduced at trial concerning other crimes, defendant could not assign them as error on appeal. App. R. 10(b)(2).

APPEAL by defendant from *Burroughs, Judge*. Judgment entered 16 December 1982 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 9 December 1983.

State v. Queen

Defendant appeals from a judgment of imprisonment entered upon his conviction of committing a crime against nature.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in admitting evidence that he committed a crime against nature on two occasions other than that for which he was indicted. He did not, however, object to this evidence at trial. He thus has waived his right to assert the alleged error on appeal. G.S. 15A-1446(b); *State v. McDougall*, 308 N.C. 1, 9, 301 S.E. 2d 308, 314, *cert. denied*, --- U.S. ---, 78 L.Ed. 2d 173, 104 S.Ct. 197 (1983).

Defendant contends the court erred in instructing on this evidence. He did not, however, object to the instructions at trial. He thus cannot assign them as error on appeal. N.C. R. App. P. 10(b)(2).

We do not find "plain error" in the admission of, or the instructions on, this evidence. *See State v. Odom*, 307 N.C. 655, 660-61, 300 S.E. 2d 375, 378-79 (1983).

Defendant contends that by instructing the jury as to the evidence of all three acts, rather than solely that for which he was indicted, the court sanctioned a nonunanimous verdict. His theory is that the instructions left the jury "free to choose any of the incidents" and "did not make it clear that the jury had to be unanimous as to which incident it found had been proved."

Again, defendant did not object to the instructions at trial and thus cannot assign them as error on appeal. N.C. R. App. P. 10(b)(2). Further, in his opening remarks to the jury the prosecuting attorney described the incident set forth in the indictment as the one for which defendant was being tried. This was the only one of the three incidents as to which there was testimony which corroborated that of the victim. The record provides no basis for concluding that the jury disbelieved the corroborated evidence as

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to this incident and believed the uncorroborated evidence as to the others. We thus find this contention without merit.

Defendant finally contends the court erred in admitting prejudicial evidence on cross-examination of defendant. Again, defendant did not object to the prosecuting attorney's question, and thus has no right to assert the alleged error on appeal. G.S. 15A-1446(b); *State v. McDougall, supra*. The question posed was not so grossly improper as to require *ex mero motu* intervention by the trial court. See *State v. Jordan*, 49 N.C. App. 561, 568-70, 272 S.E. 2d 405, 410-11 (1980). Finally, defendant's answer to the question denied the accusation contained therein. We thus find no merit to this contention.

No error.

Judges WEBB and WELLS concur.

REBECCA WATTS, DORA COOK, AUGUSTA HUFFMAN, MARIE JACKSON, FLOY PROPST, ROGER REEVES AND WIFE, KATHY REEVES, RUTH TEAGUE, PAUL TABOR, STEVE YOUNG AND WIFE, SHEILA YOUNG v. TOWN OF VALDESE AND BROWN-LOVING CO.

No. 8225SC1332

(Filed 3 January 1984)

Municipal Corporations § 22.3— sale of town property— authorization by statute

An action by town residents to enjoin completion of a sale of town property under a 5 May 1981 option to purchase was rendered moot when the defendant purchaser cancelled the contract. Furthermore, the town was authorized by G.S. 160-265, which became effective 18 June 1982, to approve a second option to purchase the property on 26 August 1982.

APPEAL by plaintiffs from *Griffin, Judge*. Order entered 31 August 1982 in Superior Court, BURKE County. Heard in the Court of Appeals 28 November 1983.

McMurray & McMurray, by John H. McMurray and Martha McMurray, for plaintiff appellants.

Mitchell, Teele, Blackwell, Mitchell and Smith, by H. Dockery Teele, Jr., for defendant appellee Town of Valdese.

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WHICHARD, Judge.

On 5 May 1981 defendant Town entered an option contract with defendant Brown-Loving Co. for sale of the Town's Crow Hill Park property. Plaintiffs, residents of defendant Town, brought this action seeking to enjoin completion of this sale, and also seeking permanently to enjoin any sale of this property. They appeal from entry of summary judgment for defendant Town dismissing the action.

Defendant Town's forecast of evidence in support of its motion for summary judgment established that defendant Brown-Loving Co. cancelled the 5 May 1981 contract. Plaintiffs did not respond with a forecast of evidence contra. *See Best v. Perry*, 41 N.C. App. 107, 109-10, 254 S.E. 2d 281, 283 (1979). The uncontroverted forecast of evidence thus established the absence of any remaining controversy as to that contract, rendering the action, in that regard, moot. "Whenever, during the course of litigation it develops that . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed . . ." *In re Peoples*, 296 N.C. 109, 147, 250 S.E. 2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L.Ed. 2d 297, 99 S.Ct. 2859 (1979). It was thus proper, insofar as the action related to the 5 May 1981 contract, to enter summary judgment dismissing it. *Best, supra*.

On 26 August 1982 defendant Town approved a request from defendant Brown-Loving Co. for the grant of a second option to purchase the Crow Hill Park property. Since plaintiffs seek permanently to enjoin sale of this property, the grant of this option is within the ambit of this action.

G.S. 160A-265 provides:

"In the discretion of the council, a city may: . . . sell or dispose of real and personal property, without regard to the method or purpose of its acquisition or to its intended or actual governmental or other prior use." This statute became effective 18 June 1982. Act of June 18, 1982, ch. 1236, 1981 N.C. Sess. Laws 125. It thus governed the 26 August 1982 action of defendant Town, and as a matter of law defendant Town had authority to approve the second option. There thus was no legal basis for permanently enjoining the proposed sale; and it was proper, insofar

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as the action related to the second option, to enter summary judgment dismissing it.

Affirmed.

Judges HILL and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 JANUARY 1984

GARRIS v. CROMPTON PILOT MILLS No. 8210IC1181	Industrial Commission (H-6775)	Affirmed
STATE v. HAMBY No. 8323SC308	Wilkes (81CRS8893)	New Trial
STATE v. HOPE No. 8316SC327	Scotland (82CRS3096)	No Error
STATE v. WELLS No. 8323SC507	Wilkes (82CRS5553) (82CRS5554)	No Error

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ADVERSE POSSESSION

§ 25. Sufficiency of Evidence

The trial court's findings were insufficient to support its judgment awarding title to a parcel of land to the plaintiffs by virtue of adverse possession under color of title. *Spivey v. Porter*, 818.

APPEAL AND ERROR

§ 6. Right to Appeal Generally

The prevailing party may appeal from a judgment that is only partly in its favor or is less favorable than the party thinks it should be. *New Hanover County v. Burton*, 544.

§ 6.2. Finality as Bearing on Appealability

In a civil action in which plaintiff sought to have a California judgment accorded full faith and credit by having defendant held in contempt by the North Carolina courts, the order appealed from was interlocutory in that it resolved only one of several issues regarding whether the California judgment should be given full faith and credit. *West v. West*, 417.

In an action brought by the State seeking to remove defendant sheriff from office, the State had a substantial interest in the speedy resolution of the removal proceedings against the sheriff and could appeal from the order granting defendant's motion for a 120 day discovery period, even though it was interlocutory. *S. v. Huskey*, 550.

§ 16.1. Limitations on Powers of Trial Court after Appeal

The trial court had no authority to enter a supplemental order after notice of appeal had been given from the court's original judgment. *Oshita v. Hill*, 326.

§ 24. Necessity for Objections

Plaintiff waived his right to argue the admission of certain testimony on appeal by failing to object to earlier identical testimony. *State ex rel. Everett v. Hardy*, 350.

§ 31.1. Necessity for Objections to Charge

Where defendant never specifically requested limiting instructions pursuant to G.S. 1A-1, Rule 51(b), the assignments relating to the trial court's instructions were overruled. *Sykes v. Floyd and Sykes v. Floyd*, 172.

§ 57. Review of Findings

In a civil action to recover damages for an alleged breach of contract, the trial court's findings failed to address crucial aspects of the rights and obligations of the parties arising upon the evidence. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 242.

In an action brought under the "Protection of the Abused, Neglected, or Exploited Disabled Adult Act," the trial court's findings were insufficient to support the conclusion that the adult was not abused and that there was no evidence of neglect or exploitation. *In re Lowery*, 320.

§ 68. Law of the Case and Subsequent Proceedings

Where the Court of Appeals reversed and remanded an Industrial Commission decision, and the appellees petitioned for discretionary review in the Supreme Court at the same time that the appellees in *Godley v. County of Pitt* petitioned for

APPEAL AND ERROR — Continued

discretionary review in the Supreme Court, where the *Godley* case and the present case presented the same basic legal issues for appellate review, where only the *Godley* case's petition for discretionary review was allowed, where the Supreme Court reached a result different from the result reached by the Court of Appeals in the present case, and where the Industrial Commission followed the instructions of the Court of Appeals upon remand on this case, the Court of Appeals was bound by the doctrine of the law of the case, and it was not appropriate for the Court of Appeals to consider what the Supreme Court said in the *Godley* decision. *Barrington v. Employment Security Commission*, 602.

APPEARANCE**§ 1.1. What Constitutes a General Appearance**

By moving for leave to withdraw a motion challenging the court's jurisdiction over his person, and by then seeking leave to file a new motion to set aside the order for alimony *pendente lite* and child support, and receiving leave to file further motions as he saw fit, defendant thereby submitted his person to the jurisdiction of the court. *Hall v. Hall*, 797.

ARREST AND BAIL**§ 3.4. Legality of Arrest for Sale or Possession of Narcotics**

Officers had probable cause to make a warrantless arrest of defendant for trafficking in marijuana at an airport at which he had landed to refuel an airplane which had earlier landed in the middle of the night at a smaller airport. *S. v. Coffey*, 751.

§ 11. Liabilities on Bail Bonds

An appearance bond required by district court in North Carolina, which was based on an extradition warrant from California, imposed terms and conditions beyond those authorized by the Uniform Extradition Act and, therefore, did not bind either principal or surety. *S. v. Cronauer*, 449.

ASSAULT AND BATTERY**§ 13.1. Competency of Evidence Showing Motive, Intent or Design**

The trial court properly excluded evidence that a member of the victims' church had told defendant to leave his ex-wife alone, and not to come around her or their children since defendant laid no foundation to show the relevance of the testimony. *S. v. Ingram*, 585.

§ 14.2. Sufficiency of Evidence of Assault with Deadly Weapon where Weapon Is a Firearm

The State's evidence was sufficient for the jury in a prosecution for felonious assault with a deadly weapon. *S. v. Owens*, 107.

ATTORNEYS AT LAW**§ 4. Testimony by Attorney**

The trial court did not err in declaring a mistrial when one of defendant's attorneys testified as a subpoenaed witness for the State. *S. v. Malone*, 782.

ATTORNEYS AT LAW — Continued**§ 5.1. Liability for Malpractice**

A trial judge abused his discretion by failing to dismiss plaintiff's action on the basis of a flagrant violation of Rule 8(a)(2) and the resulting adverse publicity where the plaintiff stated demands in his complaint for damages totaling almost \$2 million arising from his legal malpractice claim. *Schell v. Coleman*, 91.

AUTOMOBILES AND OTHER VEHICLES**§ 5. Sale and Transfer of Title**

An indictment for knowingly swearing or affirming falsely to an application for title to a motor vehicle was invalid where it failed to allege what information on the application was false. *S. v. Baker*, 430.

§ 43. Plaintiff's Pleadings; Sufficiency of Allegations of Negligence

A vendor who sells malt beverages to a minor under 18 can be held liable to a third party negligently injured or killed by an intoxicated minor as the result of an automobile collision. *Freeman v. Finney* and *Zwigard v. Mobil Oil Corp.*, 526.

§ 55. Sufficiency of Evidence of Negligence; Stopping Without Signal

Plaintiff's evidence was ample to show that defendants were negligent *per se* in leaving a disabled truck in a lane of traffic, unattended and without warning signals, in violation of G.S. 20-161(c). *Clark v. Moore*, 609.

§ 80.1. Contributory Negligence; Turning in Front of Oncoming Vehicle

A jury question was presented as to whether negligent acts or omissions on the part of plaintiff were a proximate cause of a collision between plaintiff's motor-cycle and a vehicle which made a left turn across his lane of travel. *Cook v. Ponos*, 705.

§ 88. Sufficiency of Evidence of Contributory Negligence Generally

In a personal injury action where plaintiff drove his pickup truck into the rear of an oil company truck which had been abandoned on the road, the jury could reasonably infer from plaintiff's evidence that he was driving with the blinding sun in his face; that plaintiff was exercising the ordinary care required of a reasonably prudent person who finds himself driving with the blinding sunlight in his face. *Clark v. Moore*, 609.

§ 113.2. Insufficiency of Evidence of Homicide

The evidence was insufficient to permit an inference that defendant's violation of statutes pertaining to leaving a vehicle standing upon the paved portion of the highway and warning signals and lights for such vehicles constituted a willful, wanton or intentional violation of the statutes or a heedless or thoughtless indifference to the safety of others so as to support conviction of defendant for involuntary manslaughter. *S. v. Gooden*, 669.

§ 114. Homicide; Instructions

In a prosecution in which defendant was convicted of two counts of death by vehicle, the trial court erred in failing to instruct on the intervening negligence of another as a defense. *S. v. Tioran*, 122.

§ 120. Driving While Under the Influence; Generally

Defendant was not denied his constitutional rights to notice and due process when he was indicted under G.S. 20-138(a) for driving under the influence of intox-

AUTOMOBILES AND OTHER VEHICLES — Continued

icants and was convicted under G.S. 20-138(b) of driving with a blood alcohol content of .10 percent or more. *S. v. Lockamy*, 75.

§ 121. Driving Under the Influence; "Driving" Within Purview of Statute

The State's evidence was sufficient to show that defendant "operated" a vehicle so as to support his conviction of driving with a blood alcohol content of .10 percent or more by weight. *S. v. Kelley*, 159.

§ 122. Driving Under the Influence; "Highway" Within Purview of Statute

The operation of a vehicle on the emergency strip adjacent to an interstate highway constituted the operation of the vehicle on a "highway" so as to support conviction of defendant for driving with a blood alcohol content of .10 percent or more by weight. *S. v. Kelley*, 159.

§ 126. Driving Under the Influence; Competency and Relevancy of Evidence

Evidence concerning defendant's operation of a vehicle prior to the time he was stopped and of his behavior after he was stopped was admissible to substantiate the results of a breathalyzer test. *S. v. Malone*, 782.

§ 126.2. Driving Under the Influence; Breathalyzer Test

Evidence that a breathalyzer test showed the amount of alcohol in defendant's blood to be .10 percent was sufficient to support conviction of defendant for operating a motor vehicle with a blood alcohol content of .10 percent or more by weight although there was nothing in the record to show that defendant's blood alcohol level was measured by weight. *S. v. Lockamy*, 75.

BILLS AND NOTES**§ 20. Sufficiency of Evidence**

Summary judgment was properly entered for plaintiff in an action against the surety on a promissory note. *Whitley v. Coltrane*, 679.

BILLS OF DISCOVERY**§ 6. Compelling Discovery**

There was no merit to defendant's contention that the trial court erred by refusing to give him access to the tape recorded statements of a State's witness. *S. v. Luker*, 644.

BROKERS AND FACTORS**§ 6. Right to Commissions Generally**

A genuine issue of material fact for the jury was presented as to whether plaintiff real estate broker secured a purchaser ready, willing and able to buy defendants' property on defendants' terms so as to entitle plaintiff to a commission. *Southland Assoc. Realtors v. Miner*, 126.

BURGLARY AND UNLAWFUL BREAKINGS**§ 1.2. What Constitutes "Breaking"**

Evidence that an accomplice went through an open window of a house and then opened the front door for defendant to enter the house was sufficient to show a constructive breaking by defendant. *S. v. Smith*, 770.

BURGLARY AND UNLAWFUL BREAKINGS — Continued**§ 5. Sufficiency of Evidence Generally**

The State's evidence was sufficient for the jury to find a nonconsensual entry and an intent to commit larceny so as to support the conviction of defendant for first degree burglary. *S. v. Coleman*, 23.

The State's evidence was sufficient to permit the jury to find that defendant broke into the house of the prosecutrix with the intent to commit the felony of rape therein so as to support his conviction for first degree burglary. *S. v. Norris*, 336.

The evidence was sufficient to support verdicts of first degree burglary and attempted second degree rape. *S. v. Stinson*, 570.

§ 5.2. Sufficiency of Evidence; Time of Offense

In a prosecution for second degree burglary, the evidence was sufficient to show that the breaking and entry occurred in the nighttime. *S. v. Squalls*, 599.

§ 5.5. Sufficiency of Evidence of Breaking and Entering

In a prosecution for felonious breaking and entering, the evidence was sufficient to survive defendant's motion to dismiss. *S. v. Bradley*, 359.

§ 5.6. Sufficiency of Evidence of Breaking and Entering Where Target Felony Is Thwarted

The evidence was sufficient to support a charge of felonious breaking or entering of a vacant apartment even though the evidence of defendant's intent to commit larceny was circumstantial. *S. v. Salters*, 31.

§ 5.7. Sufficiency of Evidence of Breaking and Entering and Larceny Generally

Defendant's conviction for breaking or entering an automobile must be reversed where the trial court failed to instruct on acting in concert and the State failed to show that defendant personally broke into the automobile. *S. v. Smith*, 770.

§ 6. Instructions Generally

In a prosecution for felonious breaking and entering, the trial court committed prejudicial error by failing to instruct the jury as to the limited circumstances under which palm print evidence would be sufficient to support a conviction. *S. v. Bradley*, 359.

§ 7. Instructions on Lesser Included Offenses

The trial court in a first degree burglary case erred in failing to submit the lesser included offense of second degree burglary where the evidence would permit, but not require, the jury to find that defendant entered the victims' home when it was unoccupied. *S. v. Simons*, 164.

In a prosecution for second degree burglary, the trial judge properly failed to instruct on the lesser included offenses of felonious breaking and entering and misdemeanor breaking and entering. *S. v. Squalls*, 599.

CANCELLATION AND RESCISSION OF INSTRUMENTS**§ 4. Rescission for Mutual Mistake**

A sale of land was not subject to rescission on the ground of mutual mistake because restrictive covenants limited use of the land to residential purposes and the parties did not know at the time of the conveyance that a necessary septic tank system could not be approved for the land. *Balmer v. Nash*, 401.

COLLEGES AND UNIVERSITIES**§ 4. Liability for Injuries to Students**

The foreseeability of a criminal assault determines a college's duty to safeguard its students from criminal acts of third persons. *Brown v. N.C. Wesleyan College*, 579.

CONSTITUTIONAL LAW**§ 20.1. Equal Protection; Actions Affecting Businesses**

The statutory provision permitting homeowner or property owner associations to conduct bingo games or raffles bears no rational relation to the purposes of the gambling prohibition or the charitable exemption, and had the effect of treating similarly situated persons and groups differently, without a rational basis for such differential treatment thereby making it inconsistent with the constitutional guaranty of equal protection contained in Art. I, § 19 of the North Carolina Constitution. *S. v. McCleary*, 174.

The portion of G.S. 14-292.1(d) requiring the exempt organization facilities financed by bingo or raffle proceeds to be made available for use by the general public "from time to time" is simply insufficient to prevent the grant of this special gambling privilege to exempt charitable organizations from violating the Exclusive Emoluments Clause of the North Carolina Constitution. *Ibid*.

§ 22. Religious Liberty

Trial court erred in holding that, as a matter of law, plaintiff had a constitutionally protected religious belief that required him to educate his children at home that outweighed the State's compelling interest in compulsory education. *Delconte v. North Carolina*, 262.

§ 23.4. Due Process; Actions Affecting Businesses

The legislature could reasonably determine that commercialized gambling for profit is typically conducted in a manner as to threaten the public order or morals, and seek to suppress it, while allowing religious and charitable organizations to conduct bingo games and raffles without violating the due process rights of individuals. *S. v. McCleary*, 174.

§ 24.7. Due Process; Service of Process and Jurisdiction over Foreign Corporations

In a declaratory judgment action to determine whether the insurer for a tractor-trailer owner or the insurer for its lessee had primary coverage for an accident involving the nonresident defendants, the courts of this state had jurisdiction over the nonresident defendants under G.S. 1-75.4(1)(d), and the assertion of personal jurisdiction over the nonresident defendants did not violate due process. *Fireman's Fund Insur. Co. v. Washington*, 38.

§ 28. Due Process and Equal Protection Generally in Criminal Proceedings

The district attorney's offer to dismiss narcotics charges against the wife on condition that the husband plead guilty to one felony charge did not constitute an abuse of prosecutorial discretion or a deprivation of the wife's right to due process. *S. v. Summerford*, 519.

§ 30. Discovery

Any failure of the State to comply with its duty to disclose a short voluntary statement of defendant was nonprejudicial since the State did properly disclose the

CONSTITUTIONAL LAW — Continued

existence of defendant's second, longer statement in which he also confessed to the crime charged. *S. v. Moore*, 56.

§ 40. Right to Counsel Generally

Defendant failed to show any prejudice resulting to him as the result of at least one visit by a police officer to defendant's jail cell without prior notice to defendant's attorney. *S. v. Moore*, 56.

§ 46. Withdrawal of Appointed Counsel

In a criminal prosecution, it was error for defense counsel to force defendant to elect between having counsel and testifying in his own behalf. *S. v. Luker*, 644.

Although defendant was denied his constitutional right to assistance of counsel in presenting his defense when his counsel improperly withdrew after the presentation of the State's evidence, defendant was not denied a fair trial, and the constitutional error was harmless beyond a reasonable doubt in that the jury would have reached the same verdict had counsel not withdrawn. *Ibid.*

§ 48. Effective Assistance of Counsel

A failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances. *S. v. Simmons and S. v. Hallman*, 294.

The same attorney's representation of the female defendant and her husband on narcotics charges did not deny the female defendant the effective assistance of counsel because the district attorney offered to drop charges against the wife if the husband would plead guilty to one felony charge. *S. v. Summerford*, 519.

The same attorney's representation of the female defendant and her husband on narcotics charges did not deny the female defendant the effective assistance of counsel because the female defendant was less culpable or because the husband's parents paid the attorney fee for both defendants. *Ibid.*

§ 49. Waiver of Right to Counsel

In a prosecution for armed robbery, defendant's purported waiver of counsel and election to proceed *pro se* in superior court were deficient in several respects. *S. v. Williams*, 498.

§ 50. Speedy Trial Generally

In a prosecution for obtaining money by false pretense, defendant failed to show that he was denied his constitutional right to a speedy trial even though a total of 123 days elapsed between the date of arrest and the date the trial began. *S. v. Kilgore*, 331.

CONTRACTS**§ 4.2. Circumstances Where There Was No Consideration**

An oral preincorporation agreement between plaintiff and defendant, husband and wife, was not enforceable because the agreement was not based on valuable consideration. *Penley v. Penley*, 711.

§ 29.1. Measure of Damages Under Contractual Provision

The trial judge's award for defendant contractor's failure to repair defective work was based upon the proper measure of the cost of repairs rather than on evidence of the difference in fair market value of the property. *Hayworth v. Brooks Lumber Co.*, 555.

CORPORATIONS**§ 4.1. Authority and Duties of Stockholders**

A shareholders' agreement was unenforceable because it was not in writing. *Penley v. Penley*, 711.

§ 16. Sale of Capital Stock and Issuance of Stock by Corporation

A preincorporation subscription agreement was not enforceable because it was not in writing. *Penley v. Penley*, 711.

COURTS**§ 2. Jurisdiction Generally**

Where the trial court's order that it lacked personal jurisdiction over respondent became the law of the case when petitioner withdrew its appeal therefrom, the court did not have authority to grant petitioner the relief of 30 days within which to commence a new action based on the same claim. *Martin Marietta Corp. v. Forsyth Zoning Bd. of Adjustment*, 316.

CRIMINAL LAW**§ 9. Aiders and Abettors**

The evidence was sufficient to support defendant's conviction of felonious sale and delivery of marijuana on the theory that one who aids or abets another in the commission of a crime is guilty as the principal. *S. v. Thomas*, 539.

§ 10. Accessories Before the Fact

A defendant may not be punished for both accessory before the fact of larceny and possession of the stolen goods. *S. v. Maynard*, 612.

§ 10.2. Accessory Before the Fact; Sufficiency of Evidence

In a prosecution for accessory before the fact of felonious larceny, the trial court properly found that defendant was not constructively present at the larceny. *S. v. Maynard*, 612.

§ 15. Venue

Defendant failed to show an abuse of discretion on the part of the trial court in denying his motion for change of venue. *S. v. Welch*, 390.

§ 15.1. Change of Venue because of Pretrial Publicity

The trial court did not abuse its discretion in denying defendant's motion for a change of venue because of pretrial newspaper publicity. *S. v. Norris*, 336.

§ 23. Guilty Plea

A failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances. *S. v. Simmons* and *S. v. Hallman*, 294.

§ 23.1. Acceptance of Guilty Plea Generally

The trial court's violation of G.S. 15A-1022 and defendant's constitutional rights by accepting defendant's negotiated guilty plea without personally advising defendant of the matters set forth in the statute and without making an affirmative finding that his plea was voluntary constituted harmless error. *S. v. Williams*, 472.

CRIMINAL LAW — Continued**§ 29.1. Procedure for Raising and Determining Issue of Mental Capacity**

The requirement of G.S. 15A-1002 that a hearing be held to determine defendant's capacity to proceed to trial when his capacity is questioned was complied with where defendant's motion for an evaluation to determine his capacity to stand trial was made during a recorded conference in the judge's chambers. *S. v. Gates*, 277.

§ 33. Facts in Issue and Relevant to Issues in General

An eyewitness who heard and saw defendant inside the victim's house, called the police, and talked to the officers at the scene, was properly allowed to respond that he told the police "where the back door was" in response to a question by the police. *S. v. Isom*, 223.

The trial court properly excluded evidence that a member of the victims' church had told defendant to leave his ex-wife alone, and not to come around her or their children since defendant laid no foundation to show the relevance of the testimony. *S. v. Ingram*, 585.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Knowledge, Intent, and Motive

In a prosecution for obtaining money by false pretense, the trial judge properly allowed evidence of similar transactions on the part of the defendant. *S. v. Kilgore*, 331.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Modus Operandi or Common Plan

In a prosecution for trafficking in heroin, the trial court properly admitted testimony that police had found heroin in or near defendant's house on two other occasions. *S. v. Weldon*, 376.

§ 43. Photographs

Photographs of a truck taken after its allegedly unlawful seizure were properly admitted to illustrate testimony concerning an earlier lawful search of the truck. *S. v. Baker*, 430.

§ 57. Evidence in Regard to Firearms

A deputy sheriff was properly permitted to give opinion testimony as to the direction of the ejection of a shell casing from a weapon where defendant laid a proper foundation for such testimony on cross-examination of the witness. *S. v. Clark*, 286.

§ 60.5. Fingerprint Evidence; Competency and Sufficiency of Evidence

A proper foundation was laid for an expert in latent fingerprint identification to testify that fingerprints lifted from a suitcase matched those of an identification card bearing defendant's name. *S. v. Porter*, 13.

In a prosecution for felonious breaking and entering, the trial court committed prejudicial error by failing to instruct the jury as to the limited circumstances under which palm print evidence would be sufficient to support a conviction. *S. v. Bradley*, 359.

§ 61. Evidence as to Shoe Prints

The trial court properly admitted testimony by a non-expert witness concerning the similarity of defendant's shoe sole and a shoe print found at the crime scene. *S. v. Plowden*, 408.

CRIMINAL LAW — Continued

§ 62. Lie Detector Tests

In a prosecution for burning a dwelling house in violation of G.S. 14-65 and for making a false claim in order to procure insurance proceeds in violation of G.S. 14-214, the trial court erred in admitting the results of a polygraph test even though both parties stipulated that the results could be admitted. *S. v. Knight*, 595.

§ 66.9. Photographic Identification; Suggestiveness of Procedure

Pretrial photographic lineups were not unnecessarily suggestive because defendant was the only person in the second lineup who was also included in the first, and an in-court identification of defendant was of independent origin from the lineup identifications. *S. v. Norris*, 336.

§ 66.14. Independent Origin of In-Court Identification as Curing Improper Pretrial Identification

The trial court properly found that witnesses' in-court identifications of defendant were based on observations independent of the photographic identification. *S. v. Welch*, 390; *S. v. Ford*, 776.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

The trial court properly determined that a rape victim's in-court identification of defendant was not tainted by a pretrial photographic identification and was admissible in evidence. *S. v. Plowden*, 408.

§ 71. Shorthand Statements of Fact

A witness's testimony that his truck was "stolen" was admissible as a shorthand statement of fact. *S. v. Baker*, 430.

§ 73.2. Statements not within Hearsay Rule

A question which asked an officer to tell the description of a suspect which he gave to another officer was not hearsay. *S. v. Isom*, 223.

§ 75. Admissibility of Confession in General

A written, signed statement by defendant was admissible into evidence where it was taken only after police read defendant his *Miranda* rights and defendant's attorney had arrived and where there was no evidence that police threatened defendant or promised him rewards for confessing. *S. v. Moore*, 56.

§ 75.5. Confession; Requirement that Defendant be Warned of Constitutional Rights

The trial court erred in admitting defendant's in-custody statements made without the benefit of *Miranda* warnings on the ground that defendant knew of his constitutional right to remain silent and that anything he said might be used against him. *S. v. Young*, 346.

§ 75.7. Confession; When Warning of Constitutional Rights Is Required

Statements made by a police officer were of such nature that the officer should have reasonably known that they might elicit an incriminating response from defendant, and defendant's incriminating response was inadmissible where defendant had not been given the *Miranda* warnings. *S. v. Young*, 346.

§ 80.1. Foundation and Authentication of Records

In a prosecution for trafficking in heroin, the trial court properly admitted into evidence an Eastern Airline's reservation computer printout for two flights arriving from New York City on 21 January 1982. *S. v. Porter*, 13.

CRIMINAL LAW — Continued**§ 84. Evidence Obtained by Unlawful Means**

The admission of testimony gained through an illegal search that the frame serial number of a pickup truck in defendant's possession began with "F10" was harmless error. *S. v. Baker*, 340.

§ 85.2. Character Evidence Relating to Defendant; State's Evidence Generally

The trial court erred in permitting the prosecution to ask a character witness his opinion as to defendant's reputation for truthfulness and honesty and in permitting the witness to testify about specific acts of the defendant. *S. v. Young*, 700.

§ 86.4. Impeachment of Defendant; Prior Arrests, Indictments, and Accusations of Crime

In a prosecution for felonious breaking and entering, the trial court properly allowed cross-examination of defendant concerning three other break-ins and testimony concerning those break-ins. *S. v. Williams*, 383.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

In a prosecution for forgery and uttering forged instruments, the trial court did not err in allowing the State to inquire into the details of defendant's drug use on cross-examination. *S. v. Gates*, 277.

§ 88.1. Conduct and Scope of Cross-Examination

The trial court properly admitted testimony over the objection of defendant regarding the lack of any evidence linking anyone other than defendant to the victim's dorm room. *S. v. Stinson*, 570.

§ 88.3. Cross-examination as to Collateral Matters

In a prosecution for felonious sale and delivery of marijuana, the trial court properly excluded testimony elicited on cross-examination which tended to show that two undercover officers persuaded defendant to introduce them to someone who could sell them LSD and marijuana. *S. v. Thomas*, 539.

§ 91. Speedy Trial

The speedy trial provisions of the Interstate Agreement on Detainers were inapplicable to Forsyth County charges against defendant where Forsyth County never filed a detainer against defendant and defendant only filed a request for a speedy trial on charges pending against him in Guilford County. *S. v. Parr*, 415.

The State's entry of voluntary dismissals of three felony charges against defendant pursuant to G.S. 15A-931 did not violate defendant's rights to a speedy trial since no indictments were left pending after the voluntary dismissals. *S. v. Herald*, 692.

§ 91.1. Continuance

By waiting until the second day of trial to move for a continuance, defendant waived his objection to a tardy publication of the trial calendar. *S. v. Moore*, 56.

§ 91.7. Continuance of Ground of Absence of Witness

The defendant failed to show that the denial of his motion for a continuance, which was grounded on defendant's attempt to contact and interview two potential alibi witnesses, was prejudicial error or an abuse of the trial court's discretion. *S. v. Ford*, 776.

§ 92.5. Severance

In prosecutions for trafficking in a controlled substance, the trial judge erred in denying defendant's motion for severance. *S. v. Simmons* and *S. v. Hallman*, 294.

CRIMINAL LAW — Continued**§ 99.3. Court's Expression of Opinion; Remarks and Other Conduct in Connection with Admission of Evidence**

In an attempted robbery case in which the court stated that an officer's testimony "will be received for the corroboration of a prior witness, if it does, and if it doesn't the court will rule it out," failure of the trial judge thereafter to mention the testimony or to instruct that it was for the jury to decide whether the testimony was corroborative did not amount to an endorsement of the testimony as corroborative. *S. v. Cook*, 703.

§ 99.4. Court's Expression of Opinion; Conduct in Connection with Objections and Rulings

Defendant failed to show that the court expressed an opinion, in violation of G.S. 15A-1222, by summarily denying his motion to dismiss in the presence of the jury. *S. v. Welch*, 390.

§ 99.5. Court's Expression of Opinion; Admonition of Counsel

Defendant was not prejudiced when the trial judge, prior to trial and in the presence of the jury panel, admonished defendant's counsel about his absence when other cases in which he was involved had been called for trial. *S. v. Coleman*, 23.

§ 101.2. Jurors' Exposure to Publicity or Evidence not Formally Introduced

The trial court did not err in denying defendant's motions for a mistrial and to set aside the verdict on the ground that during the trial a juror had read a newspaper article about another crime which defendant had committed. *S. v. Welch*, 390.

§ 102. Argument and Conduct of Counsel and Prosecutor

The prosecuting attorney's argument did not constitute gross impropriety likely to influence the jury verdict, and the trial judge did not abuse his discretion in allowing the prosecutor's argument. *S. v. Lipscomb*, 161.

§ 102.8. Jury Argument; Comment on Failure to Testify

A prosecutor's comment during final argument upon the defendant's failure to testify was prejudicial error requiring a new trial. *S. v. Oates*, 112.

§ 111.1. Sufficiency of Particular Miscellaneous Instructions

The trial court erred in failing to give defendant's requested instruction concerning the burden of proof of identification, and factors the jury should consider in determining the reliability of the identification of defendant. *S. v. Smith*, 684.

§ 112.1. Instructions on Reasonable Doubt

The trial court did not err in instructing that a reasonable doubt is generated by "insufficiency of proof" without instructing further that such doubt could arise "out of the evidence." *S. v. Lockamy*, 75.

§ 113.5. Charge on Defense of Alibi

The trial judge summarized defendant's alibi evidence to the extent necessary to apply the law thereto. *S. v. Owens*, 107.

§ 116.1. Particular Charges on Defendant's Failure to Testify

The court's instruction that "There was no evidence offered directly by the defendant, but there was a great deal of evidence elicited by way of cross-examination of the State's witnesses" did not constitute an improper comment on defendant's failure to testify. *S. v. Plowden*, 408.

CRIMINAL LAW – Continued**§ 117.4. Charge on Credibility of State's Witnesses**

The trial court did not commit prejudicial error by failing to "instruct the jury as in the case of interested witnesses." *S. v. Maynard*, 81.

§ 118.2. Particular Charges on Parties' Contentions

There was no merit to defendant's contention that the court erred in omitting evidence favorable to him in its summary of the evidence. *S. v. Maynard*, 81.

§ 122.1. Jury's Request for Additional Instructions

In giving additional instructions at the jury's request, the trial judge did not err in failing to repeat his instruction that the jury could return a verdict of not guilty. *S. v. Coleman*, 23.

§ 122.2. Additional Instructions upon Failure to Reach Verdict

There was no error in the trial court ordering a jury back to the jury room for further deliberations after the foreman reported that the jury could not reach a verdict, and the judge had tentatively decided to declare a mistrial, hesitated and then decided to send the jury back for further deliberations. *S. v. Pickett*, 617.

§ 128.2. Mistrial

The trial court did not err in declaring a mistrial when one of defendant's attorneys testified as a subpoenaed witness for the State. *S. v. Malone*, 782.

§ 131.2. New Trial for Newly Discovered Evidence; Showing Required; Sufficiency of Showing

A defendant convicted of voluntary manslaughter in the shooting death of her husband was not entitled to a new trial on the ground of newly discovered evidence because of the discovery of a bullet tending to support defendant's testimony as to the location of defendant and her husband at the time of the shooting. *S. v. Clark*, 286.

Defendant's motion for appropriate relief on the basis of newly discovered evidence allegedly found in a National Automobile Dealers Association book was denied. *S. v. Baker*, 430.

§ 138. Severity of Sentence; Fair Sentencing Act

Trial judges continue to have great discretion with respect to balancing factors found in aggravation against factors found in mitigation, and their balancing process, if correctly carried out, will not be disturbed on appeal. *S. v. Hinnant*, 130.

The trial judge did not err in failing to find as mitigating factors that defendant was coerced into shooting the victim and that defendant was suffering from a mental condition (intoxication) which significantly reduced defendant's culpability. *Ibid.*

It is not necessary for a trial judge to publish a list of his considerations and the disposition thereof in a sentencing hearing. *S. v. Lipscomb*, 161.

In a sentencing hearing for a second degree murder conviction, the trial judge erred in finding as a factor in aggravation that the defendant was armed with or used a deadly weapon at the time of the crime. *Ibid.*

In a sentencing hearing upon defendant's plea of guilty to second degree murder, the trial court properly considered as aggravating factors that defendant took advantage of a position of trust and confidence to commit the offense and that the victim was mentally infirm at the time he was killed. *S. v. Potts*, 101.

CRIMINAL LAW — Continued

There was no abuse of discretion by the trial judge in failing to find as a mitigating factor that defendant cooperated with the police in disclosing the name of his unapprehended accomplice and the location of their van in a prosecution for felonious breaking or entering. *S. v. Salters*, 31.

In a prosecution for felonious breaking or entering, the trial court did not abuse its discretion by imposing an eight year sentence even though the sole aggravating factor found was defendant's prior convictions. *Ibid.*

A trial judge was not required to consider as mitigating factors that defendant was an alcoholic and that defendant suffered from glaucoma which significantly impaired his vision. *Ibid.*

In a prosecution for first degree burglary and robbery with a dangerous weapon, the imposition of consecutive forty-year sentences was not unduly harsh and was supported by the evidence. *S. v. Isom*, 223.

In a prosecution for first-degree burglary and robbery with a dangerous weapon, the trial court erred in considering as aggravating factors that the sentence was necessary to deter others from the commission of the same offense, and that a lesser sentence would unduly depreciate the seriousness of defendant's crime. *Ibid.*

In a prosecution for first-degree burglary, the trial court erred in considering as an aggravating factor that "the offense was planned," although proof of planning is not an essential element in burglary cases, since the evidence in the record failed to support it. *Ibid.*

The trial court erred in finding as an aggravating factor that defendant had served a prior prison term while also finding that defendant had prior convictions for criminal offenses punishable by more than sixty days' confinement. *Ibid.*

In a prosecution for first-degree burglary and robbery with a firearm, the trial court could properly consider as an aggravating factor that the defendant inflicted bodily injury upon his blind victim who was both helpless and defenseless in excess of the minimum amount necessary to prove this offense. *Ibid.*

The trial court did not err in using defendant's prior convictions as aggravating factors in sentencing defendant where there was no evidence concerning defendant's indigency and representation by counsel at the prior convictions. *S. v. Norfleet*, 355; *S. v. Smith*, 420; *S. v. Williams*, 373.

In a sentencing hearing, the initial burden of raising the issue of indigency and lack of assistance of counsel at a prior conviction is on the defendant. *S. v. Norris*, 336.

Defendant's evidence did not compel the trial court to find the "duress or compulsion" mitigating circumstance because of economic duress. *S. v. Smith*, 420.

The trial court did not err in failing to find as mitigating factors that (1) defendant "was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense," (2) defendant's "immaturity or his limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the offense," and (3) defendant "acted under strong provocation, or the relationship between [him] and the victim was otherwise extenuating." *S. v. Ingram*, 585.

A trial judge properly considered as two distinct aggravating factors that defendant had a prior conviction for an offense punishable by more than 60 days, and in addition, that the defendant was under a suspended sentence for the prior felony conviction. *S. v. Stinson*, 570.

CRIMINAL LAW – Continued

In imposing a sentence for trafficking in more than 100 pounds but less than 2,000 pounds of marijuana, the trial court erred in finding as aggravating factors that defendant occupied a position of leadership in the commission of the crime, that the crime was committed for pecuniary gain, that the crime involved an unusually large amount of contraband, and that the contraband involved was especially hazardous to the well-being of the community. *S. v. Coffey*, 761.

A statement by defense counsel that defendant was then serving a 9-year sentence because of a conviction in Forsyth County was sufficient to support the court's finding as an aggravating factor that defendant had a prior conviction punishable by more than 60 days' confinement. *S. v. Cook*, 703.

The trial court properly found that the aggravating factor of prior convictions had been proven by a preponderance of the evidence where the prosecutor represented to the court, on the basis of an FBI printout, that defendant had several prior convictions, and defense counsel stated that he believed the representation to be accurate and that he did not object to it. *S. v. Bynum*, 813.

While heroin addiction could perhaps be considered as a mitigating factor in imposing a sentence for possession of heroin, the evidence did not require the trial court to make such a finding. *Ibid.*

In a prosecution for larceny, the trial court erred in considering as an aggravating factor that the offense was committed for pecuniary gain. *S. v. Harris*, 816.

The trial court erred in considering as aggravating factors that the crimes involved great monetary value. *Ibid.*

A statement by the prosecutor that defendant had "a record of prior convictions" was insufficient to support the trial court's finding as an aggravating factor that defendant had prior convictions punishable by more than 60 days' confinement. *Ibid.*

The trial court erred in failing to consider as a mitigating factor that restitution was made to the victims of his larcenies. *Ibid.*

The trial court properly found that the aggravating factor of prior convictions had been proven by the preponderance of the evidence where the prosecuting attorney represented to the court that defendant had four prior convictions, and defendant requested that the court not consider one of these on the ground that he had been indigent and not represented by counsel. *S. v. McIntyre*, 807.

The trial court did not err in finding as an aggravating factor in imposing a sentence for second degree murder that defendant left the scene of the homicide, procured a gun, and returned to lie in wait to shoot the victim. *Ibid.*

It was error for the trial court to find as factors in aggravation that the sentence was necessary to deter others and that a lesser sentence would unduly depreciate the seriousness of the crime since neither factor relates to the character or conduct of the offender. *S. v. Milam*, 788.

The trial judge's finding that the jury took statutory mitigating factors "into account in its verdict" was unsupported and it was error for the trial judge to so find. *Ibid.*

In a prosecution for felonious larceny, although the trial court improperly considered as an aggravating factor that the offense was committed for pecuniary gain, the trial court could properly find as an aggravating factor on remand that the offense involved a taking of property of great monetary value. *S. v. Simmons*, 804.

Defendant did not sustain his initial burden of raising the issue that the trial court erred in finding his prior convictions as an aggravating factor. *Ibid.*

CRIMINAL LAW — Continued

The trial court properly failed to consider as a mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offense. *Ibid*.

§ 138.6. Severity of Sentence; Matters and Evidence Considered

In a resentencing hearing, the trial court erred in refusing to consider evidence of defendant's conduct subsequent to entry of his original sentence, or to consider reduction of his original sentence on the basis thereof. *S. v. Watson*, 411.

§ 143.4. Right to Counsel at Probation Revocation Hearing

Where the record is completely silent as to whether the defendant was indigent, whether the defendant knew he had a right to counsel and whether he made a knowing waiver of his right to counsel at his original trial, the trial judge should not have imposed an active prison sentence after revocation of the judgment of probation. *S. v. Barnes*, 426.

§ 154. Case on Appeal Generally

Defendant's failure to follow the Appellate Rules regarding submission of a stenographic transcript of testimony and the sheer volume of the transcript precluded the Court from addressing the questions presented by defendant regarding the trial judge's failure to find particular mitigating factors. *S. v. Milam*, 804.

§ 162.6. General Objection to Evidence

If a motion fails to allege a legal or factual basis for suppression, the trial court may summarily dismiss it. *S. v. Ingram*, 585.

§ 163. Necessity for Objection to Charge

In a prosecution for committing a crime against nature where the defendant failed to object to the instructions to the jury or to evidence introduced at trial concerning other crimes, defendant could not assign them as error on appeal. *S. v. Queen*, 820.

§ 163.3. Assignment of Error Based on Failure to Charge

Failure of the trial court to give an instruction summarizing the evidence was not so fundamental an error as to permit appellate review thereof in the absence of objection by defendant at the trial. *S. v. Norfleet*, 355.

§ 169.5. Error in Admission of Evidence not Prejudicial

In a rape prosecution in which the victim testified she had bitten defendant on what she thought was a finger of his right hand, defendant failed to show he was prejudiced by an officer's testimony that at the time defendant was arrested his left thumb appeared to have been severed and by photographs illustrating such testimony. *S. v. Alford*, 425.

§ 173. Invited Error

A party may not complain of an instruction given or omitted at his request. *S. v. Plowden*, 408.

DECLARATORY JUDGMENT ACT**§ 1. Nature and Purpose of Act**

Because a parties' preincorporation agreement was oral and its enforceability had not been proved, relief under the Declaratory Judgment Act was improper. *Penley v. Penley*, 711.

DECLARATORY JUDGMENT ACT – Continued**§ 4.6. Validity and Construction of Wills**

Where parties to a declaratory judgment action presented genuine issues regarding rights and liabilities under a will, they were entitled to have them resolved, and where the trial court failed so to adjudicate, the cause will be remanded. *Sherrod v. Any Child or Children*, 252.

DIVORCE AND ALIMONY**§ 1. Jurisdiction Generally**

By moving for leave to withdraw a motion challenging the court's jurisdiction over his person, and by then seeking leave to file a new motion to set aside the order for alimony *pendente lite* and child support, and receiving leave to file further motions as he saw fit, defendant thereby submitted his person to the jurisdiction of the court. *Hall v. Hall*, 797.

§ 1.1. Jurisdiction; Residency Requirement

The trial court in a divorce action properly found that plaintiff, a member of the United States Navy, is domiciled in North Carolina, and the court had jurisdiction of the action where it found that plaintiff had resided in this State for a period of six months. *Andris v. Andris*, 688.

§ 23. Child Custody; Jurisdiction Generally

In a child custody action instituted by the child's grandmother and step-grandfather, the trial court properly assumed jurisdiction pursuant to either G.S. 50A-3(a)(1) or (2). *Plemmons v. Stiles*, 341.

§ 24.1. Determining Amount of Child Support

The 1981 amendment to G.S. 50-13.4(b) had the effect of changing the previous rule that the mother was only secondarily liable for child support, and in all other respects involving the relative ability or inability of the mother and father to provide such support, the relevant statutory provisions remain unchanged. *Plott v. Plott*, 657.

§ 24.4. Enforcement of Support Orders

In an action in which defendant sought the court to find plaintiff in contempt of court for nonsupport of his child pursuant to a support order, the trial judge's finding of fact that plaintiff stopped making payments, not in defiance of authority, but in a good faith reliance on defendant's agreement to support the child if he would waive his visitation rights, was supported by competent evidence. *Forte v. Forte*, 615.

§ 24.7. Child Support; Where Evidence of Changed Circumstances Is Sufficient

The trial court did not err in increasing defendant father's child support payments from \$100.00 to \$200.00 per month on the basis of changed circumstances although the court found that the needs of the children were not as great as when the original support order was entered. *Phillips v. Choplin*, 506.

§ 25.6. Custody with Person Other than Parent

While the law presumes that the best interest of the child will be served by committing it to the custody of the parent, there was sufficient competent evidence to support an award of custody of the minor child to the plaintiffs who are the grandmother and step-grandfather of the child. *Plemmons v. Stiles*, 341.

DIVORCE AND ALIMONY -- Continued

The trial court did not abuse its discretion in awarding custody of minor children to their maternal grandmother rather than their father even though the court found the father to be a fit and proper person to have custody. *Phillips v. Choplin*, 506.

§ 27. Attorney's Fees Generally

An order in a child custody action directing plaintiff mother to pay fees and expenses of defendant father's attorney must be vacated where it was entered without notice to plaintiff and contained no findings that defendant was acting in good faith and had insufficient means to defray the expenses of the suit. *Allen v. Allen*, 86.

DOMICILE**§ 1. Definition; Intent**

In order to establish a domicile, a party must make a showing of both actual residence in the new locality and the intent to remain there permanently. *Andris v. Andris*, 688.

§ 2. Evidence; Presumptions

In an action in which plaintiff alleged that defendant was not a resident of the Town of Bath and was thus ineligible to serve on the Bath Town Council, the trial court properly admitted testimony concerning past disagreements between plaintiff and defendant. *State ex rel. Everett v. Hardy*, 350.

In an action in which plaintiff alleged that defendant was not a resident of the Town of Bath and was thus ineligible to serve on the Bath Town Council, the trial court properly admitted testimony by defendant in which he stated that he had written a letter to the County Board of Elections concerning his eligibility as a voter. *Ibid*.

EASEMENTS**§ 3. Easements as Appurtenant**

A prescriptive easement acquired by plaintiffs' predecessor in interest was an appurtenant easement that passed by succession to the plaintiffs. *Oshita v. Hill*, 326.

§ 6.1. Easements by Prescription; Evidence

In an action to establish a prescriptive easement in a road, plaintiffs' evidence was sufficient to establish that the use of the road was adverse and hostile. *Oshita v. Hill*, 326.

§ 6.2. Easements by Prescription; Boundaries

The evidence was sufficient to establish substantial identity of the boundaries of a prescriptive easement in a road. *Oshita v. Hill*, 326.

ELECTRICITY**§ 1. Control and Regulation Generally**

The Utilities Commission properly found that Tapoco, Inc. is a public utility where the evidence showed that electricity generated by Tapoco is exchanged with TVA for power from TVA. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 198.

ELECTRICITY — Continued**§ 3. Rates**

The Utilities Commission's use of the amount of energy generated by the combined Nantahala-Tapoco system in setting Nantahala's rates to its retail customers rather than the energy received as entitlements under agreements with TVA, Alcoa and Tapoco did not constitute a modification of such agreements and was proper. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 198.

A Utilities Commission order providing for refunds to Nantahala Power Company's retail customers and requiring Nantahala's parent company, Alcoa, to pay any portion of the refunds which Nantahala is financially unable to pay was proper and did not confiscate the property of Nantahala in violation of its due process rights. *Ibid.*

When Alcoa was held to be a public utility and was made a party to a general rate case, it received adequate notice that it might be held liable for a refund to retail customers of its wholly owned subsidiary, Nantahala Power Co. *Ibid.*

EVIDENCE**§ 11.5. Transactions with Decedent; Persons Disqualified from Testifying by Statute**

The principal debtor on a promissory note was not prohibited by the Dead Man's Statute from testifying that the deceased surety had executed the note sued on. *Whitley v. Coltrane*, 679.

An attorney for a non-party affiant is not an interested party for purposes of the Dead Man's Statute. *Ibid.*

§ 28.2. Authentication of Particular Records

The trial court properly excluded personal property tax listings which were not authenticated. *Winston-Salem Joint Venture v. City of Winston-Salem*, 532.

§ 41. Opinion Evidence as Invasion of Province of Jury

The trial court properly refused to permit plaintiff's president to state his opinion as to the amount of damages suffered by plaintiff's mail order business as a result of defendants' use of its old mailing address in magazine advertising in breach of a consent judgment. *Population Planning Assoc. v. Mews*, 96.

§ 45. Opinion Evidence as to Value

The trial court properly admitted plaintiff's opinion as to the fair market value of her property. *Moon v. Central Builders, Inc.*, 793.

FALSE PRETENSE**§ 3.1. Nonsuit**

In a prosecution for obtaining money by false pretense, the trial judge properly denied defendant's motion to dismiss. *S. v. Kilgore*, 331.

FRAUDS, STATUTE OF**§ 6.1. Contracts Affecting Realty; Cases Where Statute of Frauds Is Inapplicable**

The Statute of Frauds did not apply to an agreement giving defendant a license to use a road or to quantum meruit, trespass or unlawful timber cutting claims. *Moon v. Central Builders, Inc.*, 793.

GAMBLING

§ 3. Lotteries

The statute permitting certain charitable and religious organizations to conduct bingo games and raffles is constitutional. However, the provision permitting property owner associations to conduct bingo games and raffles violates equal protection, and the provision requiring exempt organization facilities financed by bingo or raffles to be made available for use by the general public from time to time violates the Exclusive Emoluments Clause of the N. C. Constitution. *S. v. McCleary*, 174.

GUARANTY

§ 2. Actions to Enforce Guaranty

In an action brought by plaintiff bank to enforce a guaranty agreement for \$21,672.75 where the defendants' evidence tended to show that the Hambys had agreed to be guarantors for defendant Burwell only for the amount of \$5,000.00 and not for the full amount of the note which was a consolidation of previous loans defendant Burwell owed the bank, an issue submitted to the jury which stated "What amount, if any, are the defendants . . . indebted to [the plaintiff]?" was sufficient. *First Nat'l Bank of Catawba Co. v. Burwell*, 590.

HIGHWAYS AND CARTWAYS

§ 2.1. Restrictions Against Advertisements Along Highways

Petitioner's outdoor advertising sign was not altered substantially so as to permit the Secretary of Transportation to revoke petitioner's permit for the sign. *Appalachian Poster Advertising Co. v. Bradshaw*, 117.

HOMICIDE

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence was sufficient for the jury in a prosecution for second degree murder of a victim who had thrown a cigarette butt back at defendant. *S. v. Owens*, 107.

The evidence was insufficient to support conviction of defendant for second degree murder where it showed only an opportunity to commit the crime. *S. v. Bell*, 234.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

The evidence did not show as a matter of law that defendant acted in self-defense in shooting her husband and was sufficient to support conviction of defendant for voluntary manslaughter on the basis of excessive force. *S. v. Clark*, 286.

§ 28. Instructions on Self-Defense Generally

In a prosecution where defendant-wife was found guilty of the involuntary manslaughter of her husband, there was no prejudicial error in the failure of the trial court to instruct the jury on the subject of defense of habitation as an element of the defense of self-defense. *S. v. Teel*, 423.

§ 30.2. Submission of Lesser Offense of Manslaughter not Required

Evidence in a second degree murder case that the victim threw a cigarette butt at defendant did not require the trial court to submit voluntary manslaughter as a possible verdict. *S. v. Owens*, 107.

HOSPITALS

§ 3.2. Liability of Noncharitable Hospital for Negligence of Employees

Directed verdicts were properly entered for defendants in an action to recover damages for a fractured hip sustained by the 78-year-old plaintiff in a fall while he was a patient of defendant physician in defendant hospital. *Browne v. Macaulay*, 708.

§ 3.3. Liability for Negligence of Physicians

In a medical malpractice action, the trial court erred in granting directed verdicts in favor of defendants county and hospital on the basis that an emergency room doctor was not an agent of the hospital and that therefore any alleged negligence of the defendant doctor could not be imputed to the hospital or the county. *Willoughby v. Wilkins*, 626.

HUSBAND AND WIFE

§ 3. Agency of One Spouse for the Other in General

Defendant husband's failure to respond in apt time to interrogatories and requests for admissions constituted admissions of fact by him, but such admissions were not binding on defendant wife. *Barclays American v. Haywood*, 387.

§ 14. Creation of Estate by Entireties

Plaintiff husband presented sufficient evidence to rebut the presumption of a gift to defendant wife of an entirety interest in property to which title was taken in the names of both spouses so as to entitle plaintiff to a resulting trust in the property. *Mims v. Mims*, 725.

INDICTMENT AND WARRANT

§ 9.8. Particular Allegations; Description of Property and Naming of Persons

An indictment charging defendant with armed robbery was fatally defective where it failed to state the name of the person or business from which the property was taken. *S. v. Moore*, 56.

§ 11. Identification of Victim

An indictment which named the victim as "Elred Allison" was sufficient even though the victim said his name was "Elton Allison." *S. v. Isom*, 223.

§ 13. Bill of Particulars

The trial court properly denied defendant's motion to dismiss narcotics charges because information in a bill of particulars concerning the exact times of the offenses varied with the evidence at trial. *S. v. Summerford*, 519.

INSANE PERSONS

§ 1.2. Findings Required by Involuntary Commitment Statutes

An involuntary commitment order need not be supported by a specific finding of probability of serious physical debilitation resulting from the lack of self-caring ability. *In re Crouse*, 696.

An order of involuntary commitment was not void because the court recorded the facts by placing the letter "X" by the recorded facts on the order of commitment form. *Ibid*.

INSURANCE**§ 69. Protection Against Injury by Uninsured or Unknown Motorists Generally**

A motorcycle is an "automobile" within the meaning of language in an uninsured motorist endorsement providing that the uninsured motorist coverage is only "excess insurance" with respect to bodily injury to an insured while occupying an "automobile" not owned by the named insured. *Mid-West Mut. Ins. Co. v. Govt. Employees Ins. Co.*, 143.

§ 128.1. Fire Insurance; Waiver of Forfeitures; Imputation to Insurer of Knowledge of or Notice to its Agent

The "business use" provision in a fire insurance policy was a condition working a forfeiture, which could impliedly be waived by the acts and conduct of the insurer. *Durham v. Cox*, 739.

§ 141. Construction of Burglary and Theft Policies

Defendant insurer was liable under its policy insuring plaintiff's retail jewelry store against theft for only 2% of the value of jewelry lost by theft during a break-in while the store was closed where plaintiff failed to keep 98% of the insured jewelry locked in a safe when the store was closed as required by the policy. *Michael v. St. Paul Fire Ins. Co.*, 50.

INTOXICATING LIQUOR**§ 24. Civil Liability Generally**

A vendor who sells malt beverages to a minor under 18 can be held liable to a third party negligently injured or killed by an intoxicated minor as the result of an automobile collision. *Freeman v. Finney and Zwigard v. Mobil Oil Corp.*, 526.

JUDGMENTS**§ 10. Construction and Operation of Consent Judgments**

A jury question was presented as to whether defendants breached a consent judgment while using an old Carrboro post office box address in magazine advertising for their mail order business. *Population Planning Assoc. v. Mews*, 96.

§ 21.2. Setting Aside Judgment for Fraud or Mutual Mistake

In a proceeding to caveat a 1972 will, the parties' lack of knowledge of a 1968 will of the testatrix did not constitute a mutual mistake which would support an order setting aside a consent judgment incorporating a family settlement agreement. *In re Will of Baity*, 364.

§ 51. Foreign Judgments Generally

Although plaintiff could not have enforced a deficiency judgment in a purchase money transaction in North Carolina, pursuant to the Full Faith and Credit Clause, the trial court properly granted plaintiff's motion for judgment on the pleadings in an action on a Florida deficiency judgment. *FMS Management Systems v. Thomas*, 561.

JURY**§ 6. Voir Dire Examination Generally**

The trial court did not err in the denial of defendant's motion for a sequestered individual voir dire of jurors because of pretrial publicity. *S. v. Norris*, 336.

JURY — Continued

Even assuming that there is a right to the presence of defense counsel during the State's voir dire of the jury, that the court erred in proceeding in the absence of defense counsel, and that the error was of constitutional dimension, the error, if any, was nevertheless harmless beyond a reasonable doubt. *S. v. Colbert*, 762.

LANDLORD AND TENANT

§ 2. Requisites and Validity of Lease

In an action to recover rents due under a lease agreement, the trial court properly granted summary judgment for defendant since the lease under which the plaintiffs' action was brought failed to state the amount of rent, and the amount of rent is an essential term of a lease under the law of contracts. *Smith v. Smith*, 139.

LARCENY

§ 7. Sufficiency of Evidence Generally

Defendant's conviction for larceny of a tool box must be reversed where the trial court failed to instruct on acting in concert and the State failed to show that defendant personally took and carried away the tool box. *S. v. Smith*, 770.

§ 8. Instructions Generally

Error by the trial court in refusing to instruct that defendant could not be convicted of both larceny and possession of the same property was cured by the verdict finding defendant guilty of only the possession charge. *S. v. Williams*, 373.

LIMITATION OF ACTIONS

§ 4.3. Accrual of Cause of Action for Breach of Contract in General

Plaintiff's action for breach of contract, unjust enrichment, and breach of a lease agreement against a municipality was barred by the statute of limitations. *Cooke v. Town of Rich Square*, 606.

§ 4.6. Accrual of Cause of Action for Breach of Particular Contracts

Plaintiff's contract action was barred by the three-year contract statute of limitations. *Penley v. Penley*, 711.

MASTER AND SERVANT

§ 55.1. Workers' Compensation; What Constitutes "Accident"

Plaintiff's disc condition did not result from an "accident" for workers' compensation purposes. *Griffitts v. Thomasville Furniture Co.*, 369.

§ 60.3. Workers' Compensation; Injuries During Breaks

Plaintiff's injury by accident during a regularly scheduled rest break in an enclosed backyard of the employer's plant arose out of and in the course of his employment. *Williams v. Hydro Print*, 1.

Injuries suffered by plaintiff when he slipped on accumulated coal dust on the floor of defendant power company's plant while running back to the plant canteen after a meal to get a pack of chewing gum arose out of and in the course of his employment. *Spratt v. Duke Power Co.*, 457.

§ 68. Workers' Compensation; Occupational Diseases

Plaintiff's disc condition did not constitute an occupational disease. *Griffitts v. Thomasville Furniture Co.*, 369.

MASTER AND SERVANT – Continued

In a workers' compensation action where plaintiff alleged disability from occupational chronic obstructive pulmonary disease, the case must be remanded to the Industrial Commission for findings on the question of "significant contribution" to plaintiff's disabling chronic obstructive pulmonary disease. *Swink v. Cone Mills, Inc.*, 397.

A patrol officer's phlebitis and resulting complications did not constitute an occupational disease. *Keller v. City of Wilmington*, 675.

§ 68.1. Workers' Compensation; Silicosis

Although plaintiff learned from competent medical authority in 1978 that he had the occupational disease silicosis, his claim filed 15 October 1981 was filed within the two-year statutory period where he continued working in other full-time jobs at comparable wages after he left employment by defendant in 1978 until he was forced to discontinue working in 1981 because of his silicosis. *Martin v. Petroleum Tank Service*, 565.

§ 68.4. Workers' Compensation; Subsequent Injury

The Industrial Commission did not permit a double recovery in violation of G.S. 97-33 or G.S. 97-35 in awarding plaintiff compensation for a 20% permanent partial disability from ruptured discs in his back after previously compensating plaintiff for a 15% permanent partial disability to his back for a similar injury. *Bailey v. Smoky Mountain Enterprises*, 134.

§ 69. Workers' Compensation; Amount of Recovery

The Commission's award was not proper where it did not take into account all the complications arising from plaintiff's accidental injury. *Roper v. J. P. Stevens & Co.*, 69.

§ 85. Workers' Compensation; Jurisdiction of Industrial Commission

Pursuant to G.S. 97-24(a), the Industrial Commission erred in finding it had jurisdiction to hear plaintiff's workers' compensation claim. *Weston v. Sears Roebuck & Co.*, 309.

§ 93.2. Workers' Compensation; Proceedings before Industrial Commission; Admissibility of Evidence

There was no violation of the Industrial Commission rules when plaintiff was not furnished with a copy of a memorandum, which a personnel supervisor used to refresh his recollection of a conversation he had had with plaintiff, prior to the hearing. *Bolynn v. Garlock Precision Seal*, 619.

§ 94.3. Workers' Compensation; Rehearing and Review by Industrial Commission

The full Industrial Commission, upon reviewing an award by a hearing commissioner, is not bound by the findings of fact supported by evidence but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner. *Godley v. Hackney & Sons*, 155.

§ 108. Right to Unemployment Compensation Generally

A claimant who leaves a job for health reasons has left involuntarily with good cause attributable to the employer and is entitled to unemployment benefits if he meets the three requirements set forth in G.S. 93-13(a). *Miliken & Co. v. Griffin*, 492.

MASTER AND SERVANT — Continued**§ 108.1. Right to Unemployment Compensation; Effect of Misconduct**

An employee was discharged for misconduct connected with her work for deliberately violating the employer's attendance rules and was thus not entitled to unemployment benefits. *Davis v. Corning Glass Works*, 379.

§ 108.2. Right to Unemployment Compensation; Availability for Work

A claimant who left her job which required an 11-hour shift after her doctor advised her not to work longer than an 8-hour shift because of muscle spasms was "available for work." *Milliken & Co. v. Griffin*, 492.

MUNICIPAL CORPORATIONS**§ 22.3. Use and Sale of Property**

A town was authorized by G.S. 160-265, which became effective 18 June 1982, to approve a second option to purchase town property on 26 August 1982. *Watts v. Town of Valdese*, 822.

§ 30.3. Validity of Zoning Ordinances Generally

The trial court erroneously found that a petition for rezoning violated a portion of the county zoning ordinance. *Lee v. Union County Bd. of Commissioners*, 810.

§ 30.15. Zoning; Nonconforming Uses Generally

Examination of the record revealed ample evidentiary support for a zoning board's findings and conclusion that construction of a building would constitute enlargement of a nonconforming use. *Cannon v. Zoning Bd. of Adjustment of Wilmington*, 44.

In an action in which petitioners appealed the revocation of a building permit, the board's consideration of evidence pertaining to a request for a variance to allow a stable and pertaining to the fact that the petitioner's business had substantially increased did not constitute reversible error. *Ibid.*

§ 30.19. Zoning; Changes in Continuation of Nonconforming Use

Defendants were entitled under a zoning ordinance to resume their nonconforming use as it existed prior to the effective date of the ordinance in the absence of a finding that there was a discontinuance of such nonconforming use for a consecutive period of two years. *New Hanover County v. Burton*, 544.

§ 31.2. Zoning; Scope and Extent of Judicial Review

In an appeal from the revocation of a building permit, an examination of a superior court order revealed that the superior court did not exceed its powers. *Cannon v. Zoning Bd. of Adjustment of Wilmington*, 44.

§ 44. Actions ex Contractu

Plaintiffs' action for breach of contract, unjust enrichment, and breach of a lease agreement against a municipality was barred by the statute of limitations. *Cooke v. Town of Rich Square*, 606.

NARCOTICS**§ 1.3. Elements of Statutory Offenses Relating to Narcotics**

Felony possession of hashish is not a lesser included offense of possession with intent to sell and deliver hashish in violation of G.S. 90-95(a)(1). *S. v. Peoples*, 168.

NARCOTICS — Continued**§ 2. Indictment**

An indictment charging that defendant conspired to traffic "in at least fifty pounds of marijuana" rather than "in excess of fifty pounds" was invalid. *S. v. Goforth*, 302.

§ 3.1. Competency and Relevancy of Evidence

In a prosecution for trafficking in heroin, the trial court properly admitted testimony that police had found heroin in or near defendant's house on two other occasions. *S. v. Weldon*, 376.

In a prosecution for trafficking in heroin, the trial court properly admitted testimony that defendant's house had a reputation of being a site of illegal sale and use. *Ibid.*

§ 4. Sufficiency of Evidence

The evidence was sufficient to go to the jury in a prosecution for trafficking in heroin. *S. v. Porter*, 13.

§ 6. Forfeitures

In a proceeding on an aircraft owner's application for the return of an aircraft which had been used for trafficking in marijuana, testimony of a federal drug enforcement agent concerning the reputation of persons involved in trafficking in marijuana was not inadmissible hearsay but was competent to show that the president of the company which owned the aircraft knew or had reason to believe that the aircraft would be used to smuggle drugs. *S. v. Bass*, 801.

The trial court properly denied an aircraft owner's application for the return of a seized aircraft which had been used for trafficking in marijuana. *Ibid.*

NEGLIGENCE**§ 1.3. Violation of Statute**

A vendor who sells malt beverages to a minor under 18 can be held liable to a third party negligently injured or killed by an intoxicated minor as the result of an automobile collision. *Freeman v. Finney and Zwigard v. Mobil Oil Corp.*, 526.

§ 29.1. Particular Cases Where Evidence of Negligence Is Sufficient

Plaintiff's evidence was ample to show that defendants were negligent *per se* in leaving a disabled truck in a lane of traffic, unattended and without warning signals, in violation of G.S. 20-161(c). *Clark v. Moore*, 609.

§ 35.4. Contributory Negligence; Accidents Involving Motor Vehicles

The trial court erred in failing to grant plaintiff's motion for a judgment notwithstanding the verdict concerning the issue as to whether plaintiff contributed to her own injuries sustained in an automobile accident. *Jacobs v. Locklear*, 147.

§ 57.9. Sufficiency of Evidence in Actions by Invitees; Water Hazards

The minor plaintiff's evidence was insufficient to show that injuries he received at a motel swimming pool were caused by the negligence of defendant motel owners. *Sasser v. Beck*, 170.

§ 57.10. Sufficiency of Evidence in Actions by Invitees; Cases Involving Other Injuries Where Evidence Is Sufficient

The foreseeability of a criminal assault determines a college's duty to safeguard its students from criminal acts of third persons. *Brown v. N.C. Wesleyan College*, 579.

PARENT AND CHILD

§ 1.5. Procedure for Termination of Parental Rights

The standard of neglect to be applied under G.S. 7A-289.32(2) in a proceeding to terminate parental rights is not unconstitutionally vague. *In re Norris*, 269.

§ 1.6. Sufficiency of Evidence in Action for Termination of Parental Rights

There was sufficient evidence that a child did not receive proper care, supervision or discipline from his natural parents and that the parents' home environment was injurious to his welfare to support the trial court's determination that parental rights should be terminated for neglect of the child. *In re Norris*, 269.

A finding of adoptability is not required in order to terminate parental rights. *Ibid*.

The evidence was sufficient to support the trial court's determination that respondent father's parental rights should be terminated because of his failure to pay a reasonable portion of the cost of care for the child. *Ibid*.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 11. Malpractice Generally

The trial court erred in granting a directed verdict for an emergency room physician at the close of plaintiff's evidence in a medical malpractice action on the ground that a physician-patient relationship did not exist. *Willoughby v. Wilkins*, 626.

§ 15. Malpractice; Competency and Relevancy of Evidence Generally

In a medical malpractice action, the trial court properly denied the plaintiff's discovery motion concerning defendant doctor's prior psychiatric treatment in regard to plaintiff's case against defendant doctor; however, discovery of defendant doctor's prior psychiatric treatment should have been granted in plaintiff's case against defendant hospital. *Willoughby v. Wilkins*, 626.

The trial judge erred in preventing cross-examination of one defendant's expert witness concerning prior medical malpractice claims brought against the expert witness. *Ibid*.

§ 16.1. Malpractice; Sufficiency of Evidence Generally

Summary judgment was properly entered for defendant surgeon in an action to recover for injuries resulting from defendant's alleged negligent placement of an operating table safety strap during surgery on plaintiff where the evidence showed that the operating room nurse rather than defendant placed the safety strap on plaintiff. *Boza v. Schiebel*, 151.

§ 20. Sufficiency of Evidence of Causal Connection Between Malpractice and Injury

Directed verdicts were properly entered for defendants in an action to recover damages for a fractured hip sustained by the 78-year-old plaintiff in a fall while he was a patient of defendant physician in defendant hospital. *Browne v. Macaulay*, 708.

PROCESS

§ 9.1. Personal Service on Nonresident Individuals in Another State; Minimum Contacts Test

In a declaratory judgment action to determine whether the insurer for a tractor-trailer owner or the insurer for its lessee had primary coverage for an acci-

PROCESS — Continued

dent involving the nonresident defendants, the courts of this state had jurisdiction over the nonresident defendants under G.S. 1-75.4(1)(d), and the assertion of personal jurisdiction over the nonresident defendants did not violate due process. *Fireman's Fund Insur. Co. v. Washington*, 38.

PUBLIC OFFICERS**§ 11. Criminal Liability of Public Officers**

There was no abuse of discretion in a trial judge's decision to make an SBI report on the activities of a school superintendent available to the public. *News & Observer v. State; Co. of Wake v. State; Murphy v. State*, 576.

§ 12. Removal from Office

In an action brought by the State seeking to remove defendant sheriff from office, the State had a substantial interest in the speedy resolution of the removal proceedings against the sheriff and could appeal from the order granting defendant's motion for a 120 day discovery period, even though it was interlocutory. The action to remove a sheriff from office is neither civil nor criminal and neither the Rules of Civil Procedure nor the Rules of Criminal Procedure apply. *S. v. Huskey*, 550.

RAPE AND ALLIED OFFENSES**§ 18.2. Sufficiency of Evidence of Assault with Intent to Commit Rape**

The evidence was sufficient to support verdicts of first degree burglary and attempted second degree rape. *S. v. Stinson*, 570.

RECEIVING STOLEN GOODS**§ 2. Indictment**

An indictment charging defendant with felonious possession of stolen goods was not invalid in failing to state that the goods possessed by defendant were stolen. *S. v. Williams*, 373.

§ 5.1. Sufficiency of Evidence in Particular Cases

Evidence of the retail price of stolen merchandise constitutes evidence of fair market value sufficient to survive a motion to dismiss in a prosecution for possession of the stolen merchandise. *S. v. Williams*, 373.

The State's evidence was sufficient to support conviction of defendant for receiving a stolen pickup truck. *S. v. Baker*, 430.

§ 6. Instructions

The trial court's instructions on the elements of possession of stolen goods pursuant to a breaking and entering were sufficient. *S. v. Bennett*, 394.

Error by the trial court in refusing to instruct that defendant could not be convicted of both larceny and possession of the same property was cured by the verdict finding defendant guilty of only the possession charge. *S. v. Williams*, 373.

The trial court did not err when it submitted a possible verdict of felonious possession of stolen goods in addition to a possible verdict of accessory before the fact of felonious larceny. *S. v. Maynard*, 612.

§ 7. Verdict and Judgment

A defendant may not be punished for both accessory before the fact of larceny and possession of the stolen goods. *S. v. Maynard*, 612.

RULES OF CIVIL PROCEDURE

§ 1. Scope of Rules

In an action brought by the State seeking to remove defendant sheriff from office, the State had a substantial interest in the speedy resolution of the removal proceedings against the sheriff and could appeal from the order granting defendant's motion for a 120 day discovery period, even though it was interlocutory. The action to remove a sheriff from office is neither civil nor criminal and neither the Rules of Civil Procedure nor the Rules of Criminal Procedure apply. *S. v. Huskey*, 550.

§ 8.1. Complaint

A trial judge abused his discretion by failing to dismiss plaintiff's action on the basis of a flagrant violation of Rule 8(a)(2) and the resulting adverse publicity where the plaintiff stated demands in his complaint for damages totaling almost \$2 million arising from his legal malpractice claim. *Schell v. Coleman*, 91.

§ 26. Depositions in a Pending Action

The trial court did not abuse its discretion in denying defendants' motion to enlarge the discovery period. *Winston-Salem Joint Venture v. City of Winston-Salem*, 532.

The judgments entered against two defendant doctors must be reversed for failure to respond to a request for discovery pursuant to Rule 26(e)(1)(ii). *Willoughby v. Wilkins*, 626.

§ 36. Admission of Facts

Failure of defendant husband to respond in apt time to interrogatories and requests for admissions addressed only to him constituted admissions of fact by him under Rule 36(a), but such admissions were not binding on defendant wife. *Barclays American v. Haywood*, 387.

The trial court did not abuse its discretion in refusing to permit defendant to withdraw an admission of the genuineness of a signature on a note which resulted from defendant's failure to answer plaintiff's request for an admission. *Whitley v. Coltrane*, 679.

§ 38. Jury Trial of Right

The trial court did not err in denying respondent's motion for a jury trial. *Roberson v. Roberson*, 404.

§ 41.2. Dismissal in Particular Actions

Where the trial court's order that it lacked personal jurisdiction over respondent became the law of the case when petitioner withdrew its appeal therefrom, the court did not have authority to grant petitioner the relief of 30 days within which to commence a new action based on the same claim. *Martin Marietta Corp. v. Forsyth Zoning Bd. of Adjustment*, 316.

§ 56.7. Summary Judgment; Appeal

In an action to recover rents due under a lease agreement where the trial court granted summary judgment for defendant, the appellate court could not consider a statute which had not been brought to the trial court's attention since the appellate court's consideration is limited to the materials before the trial court. *Smith v. Smith*, 139.

RULES OF CIVIL PROCEDURE — Continued

§ 60.2. Relief from Judgment or Order; Grounds

In a proceeding to caveat a 1972 will, the discovery of a 1968 will did not constitute "newly discovered evidence" which would permit the trial judge to order a new trial. *In re Will of Baity*, 364.

§ 70. Judgment for Specific Acts

Where plaintiff's complaint stated a claim for damages for breach of a consent judgment which required a specific act, a Rule 70 motion to enforce the consent judgment by an order that the act be performed by "another party appointed by the judge" would not be appropriate. *Population Planning Assoc. v. Mews*, 96.

SALES

§ 6. Implied Warranties

The trial court properly denied plaintiffs' claim for breach of implied warranty in the sale of a lot because restrictive covenants limited use of the lot to residential purposes and a necessary septic tank system could not be approved for the property. *Balmer v. Nash*, 401.

SCHOOLS

§ 13.2. Dismissal of Teacher

The evidence was insufficient to support a school board's decision to dismiss a career teacher for being an habitual or excessive user of alcohol and for failure to fulfill his duties and responsibilities as a teacher. *Faulkner v. New Bern-Craven Bd. of Educ.*, 483.

§ 14. Criminal Liability of Parents for Failure to Send Children to School

The trial court erred in holding that a conflict between G.S. 115C-378 and Article 39 of Chapter 115C is irreconcilable so as to require that the compulsory attendance law be disregarded. *Delconte v. North Carolina*, 262.

The trial court erred in finding that plaintiff's home instruction of his children qualified as a nonpublic school under Article 39 of Chapter 115C. *Ibid*.

A trial court erred in holding that, as a matter of law, plaintiff had a constitutionally protected religious belief that requires him to educate his children at home that outweighed the State's compelling interest in compulsory education. *Ibid*.

SEARCHES AND SEIZURES

§ 3. Searches at Particular Places

Defendant had no reasonable expectation of privacy in a wrecked truck which he had placed in plain view in the customer parking area of his business in order to sell the parts, and a Division of Motor Vehicles inspector who was lawfully on the premises could properly testify that he saw in plain view that the serial number plate was missing from the truck door. *S. v. Baker*, 430.

A Division of Motor Vehicles inspector's search of defendant's pickup truck to obtain serial numbers from the truck door and body frame while it was at a service station for repairs was lawful. *Ibid*.

§ 6. Particular Methods of Search; Plain View Rule

The trial court properly denied defendant's motion to suppress evidence of marijuana seized from his premises. *S. v. Colbert*, 762.

SEARCHES AND SEIZURES — Continued

§ 7. Warrantless Search and Seizure Incident to Arrest

In a prosecution for felonious possession of marijuana with intent to sell, trafficking in cocaine and conspiracy to traffic in cocaine, the trial judge correctly concluded that the warrantless entry into defendant's home violated defendant's Fourth Amendment rights. *S. v. Yananokwiak*, 513.

§ 10. Search and Seizure on Probable Cause

In a prosecution for trafficking in heroin, the trial court properly found defendant was not unconstitutionally seized by law enforcement officers at an airport. *S. v. Porter*, 13.

In a prosecution for trafficking in heroin, an agent had probable cause to seize a brown leather suitcase from an Eastern Airlines unclaimed baggage area after hashish was discovered in defendant's purse. *Ibid*.

§ 11. Search and Seizure of Vehicles on Probable Cause

An officer had probable cause to conduct a warrantless search of defendant's automobile when he stopped defendant for driving under the influence and noticed a bank deposit bag in plain view with papers in it bearing the name of a break-in victim. *S. v. Bennett*, 394.

§ 25. Application for Warrant; Insufficiency of Showing of Probable Cause

An officer's affidavit was insufficient to support issuance of a warrant to search a residence for drugs because the information therein was stale and it failed to implicate the premises to be searched. *S. v. Goforth*, 302.

SHERIFFS

§ 1. Nature of Office and Tenure

In an action brought by the State seeking to remove defendant sheriff from office, the State had a substantial interest in the speedy resolution of the removal proceedings against the sheriff and could appeal from the order granting defendant's motion for a 120 day discovery period, even though it was interlocutory. The action to remove a sheriff from office is neither civil nor criminal and neither the Rules of Civil Procedure nor the Rules of Criminal Procedure apply. *S. v. Huskey*, 550.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

In an action brought under the "Protection of the Abused, Neglected, or Exploited Disabled Adult Act," the trial court's findings were insufficient to support the conclusion that the adult was not abused and that there was no evidence of neglect or exploitation. *In re Lowery*, 320.

§ 2. Recovery of Amount Paid to Recipient

The statute providing that the acceptance of Medicaid assistance constitutes an assignment to the State of the recipient's "right to third party insurance benefits to which he may be entitled" does not apply to a tort-feasor's liability insurance policy but applies only to the recipient's own insurance coverage. *Johnston County v. McCormick*, 63.

An automobile liability insurer who paid, on behalf of its tort-feasor insured, a claim to which a Medicaid provider has become subrogated under G.S. 108-61.2 may

SOCIAL SECURITY AND PUBLIC WELFARE — Continued

not be held liable to the Medicaid provider for the sum paid in the absence of actual or constructive notice by the insurer of the Medicaid provider's subrogated right of recovery against its insured. *Johnston County v. McCormick*, 63.

SOLICITORS**§ 1. Generally**

The district attorney's offer to dismiss narcotics charges against the wife on condition that the husband plead guilty to one felony charge did not constitute an abuse of prosecutorial discretion or a deprivation of the wife's right to due process. *S. v. Summerford*, 519.

STATUTES**§ 4.2. Statute Constitutional in Part and Unconstitutional in Part**

In prosecutions for advertising a lottery and dealing in a lottery, the trial court erred in dismissing the warrants against defendant even if its determination that G.S. 14-292.1 is unconstitutional was correct since the statutory provisions are clearly separable. *S. v. McCleary*, 174.

TRIAL**§ 3.2. Particular Grounds for Continuance**

The trial court did not abuse its discretion in the denial of the corporate defendant's motion for a continuance because of the illness of a key witness where the case had been continued several times before because of the witness's ill health. *Moon v. Central Builders, Inc.*, 793.

The trial court did not abuse its discretion in denying respondent's motion for a continuance where the evidence tended to show that three weeks before the alternate trial date, respondent chose to allow her attorney of record to withdraw so that she could find more suitable counsel. *Roberson v. Roberson*, 404.

§ 11. Argument and Conduct of Counsel

In a civil trial, the trial judge erred in refusing to allow plaintiff's counsel to comment on defendant's failure to testify. *Jacobs v. Locklear*, 147.

§ 40.1. Form of Issues

Plaintiff waived its rights to object to the form of the issue submitted to the jury by failing to object thereto at the trial. *Winston-Salem Joint Venture v. City of Winston-Salem*, 532.

§ 50.1. New Trial for Particular Acts of Misconduct of Jury

The trial court properly denied defendants' motion for a new trial based on a newspaper article purporting to show that the jury misunderstood or misapplied the law in the case. *Winston-Salem Joint Venture v. City of Winston-Salem*, 532.

TRUSTS**§ 1.1. Creation of Written Trust; Particular Cases**

A devise of a farm to testator's grandchildren with a provision that testator's son should handle the property as he thinks best until the oldest grandchild reaches the age of 30 created an active trust. *Sherrod v. Any Child or Children*, 252.

TRUSTS — Continued**§ 6.1. Discretionary Powers of Trustee**

A testamentary trust for testator's grandchildren impliedly gave the trustee the power to distribute income unequally or to accumulate it in his discretion. *Sherrod v. Any Child or Children*, 252.

§ 6.3. Authority of Trustee; Mortgage and Sale of Trust Property

A testamentary trust for testator's grandchildren impliedly gave the trustee the power to sell the only trust asset, a farm, without approval of the court. *Sherrod v. Any Child or Children*, 252.

§ 13.4. Resulting Trust; Implied Contract; Effect of Domestic Relationship Between Grantee and Payor

Plaintiff husband presented sufficient evidence to rebut the presumption of a gift to defendant wife of an entirety interest in property to which title was taken in the names of both spouses so as to entitle plaintiff to a resulting trust in the property. *Mims v. Mims*, 725.

UNFAIR COMPETITION**§ 1. Unfair Trade Practices in General**

The use of an address which is similar to a competitor's address does not constitute an unfair trade practice. *Population Planning Assoc. v. Mews*, 96.

UNIFORM COMMERCIAL CODE**§ 32. Commercial Paper; Liability of Parties**

In an action brought by plaintiff bank to enforce a guaranty agreement for \$21,672.75 where the defendants' evidence tended to show that the Hambys had agreed to be guarantors for defendant Burwell only for the amount of \$5,000.00 and not for the full amount of the note which was a consolidation of previous loans defendant Burwell owed the bank, an issue submitted to the jury which stated "What amount, if any, are the defendants . . . indebted to [the plaintiff]?" was sufficient. *First Nat'l Bank of Catawba Co. v. Burwell*, 590.

UTILITIES COMMISSION**§ 5. Jurisdiction and Authority of Utilities Commission**

The statute providing for the imposition of public utility status on certain parent corporations, G.S. 62-3(23), is not void for vagueness and does not delegate legislative power to the Utilities Commission. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 198.

The Utilities Commission properly found that Tapoco, Inc. is a public utility where the evidence showed that electricity generated by Tapoco is exchanged with TVA for power from TVA. *Ibid.*

§ 36. Property Included in Rate Base; Transactions with Subsidiaries or Affiliates

The Utilities Commission's use of the amount of energy generated by the combined Nantahala-Tapoco system in setting Nantahala's rates to its retail customers rather than the energy received as entitlements under agreements with TVA, Alcoa and Tapoco did not constitute a modification of such agreements and was proper. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 198.

UTILITIES COMMISSION — Continued

A Utilities Commission order providing for refunds to Nantahala Power Company's retail customers and requiring Nantahala's parent company, Alcoa, to pay any portion of the refunds which Nantahala is financially unable to pay was proper and did not confiscate the property of Nantahala in violation of its due process rights. *Ibid.*

§ 47. Notice of Proceedings before Utilities Commission

When Alcoa was held to be a public utility and was made a party to a general rate case, it received adequate notice that it might be held liable for a refund to retail customers of its wholly owned subsidiary, Nantahala Power Co. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 198.

VENDOR AND PURCHASER**§ 6. Responsibility for Condition of Premises; Failure to Disclose Material Facts**

The trial court properly denied plaintiffs' claim for breach of implied warranty in the sale of a lot because restrictive covenants limited use of the lot to residential purposes and a necessary septic tank system could not be approved for the property. *Balmer v. Nash*, 401.

WILLS**§ 25. Caveat; Costs and Attorney's Fees**

Where the appellate court directed that a consent judgment in a caveat proceeding be reinstated, the court was without authority to order the payment of attorney fees as part of the court costs at the hearing to set aside the consent judgment. *In re Will of Baity*, 364.

§ 35.5. Persons Entitled to Share Estate

Where testator devised a farm to his granddaughters and any unborn children of his son with a provision that the son should manage the farm until the oldest grandchild reached the age of 30, the class of beneficiaries closed at the death of testator to the exclusion of afterborn children. *Sherrod v. Any Child or Children*, 252.

§ 41.1. Illustrations of Rule Against Perpetuities

A trust created when testator devised a farm to his granddaughters and any unborn children of his son with a provision that the son should manage the farm until the oldest grandchild reached the age of 30 did not violate the rule against perpetuities. *Sherrod v. Any Child or Children*, 252.

WITNESSES**§ 6. Evidence Competent to Impeach or Discredit Witness**

In an action in which plaintiff alleged that defendant was not a resident of the Town of Bath and was thus ineligible to serve on the Bath Town Council, the trial court properly admitted testimony concerning past disagreements between plaintiff and defendant. *State ex rel. Everett v. Hardy*, 350.

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